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SUPREME COURT OF THE UNITED STATES.

No. 288. 35

EMERSON G. ORVIS, APPELLANT,

vs.

NATHAN POWELL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 23, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 288.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the fifth day of June, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the ninety-ninth year.

WILLIAM H. BRADLEY,
Clerk.

NATHAN POWELL
vs.
HENRY H. WALKER, SAMUEL J. WALKER, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brennock, Patrick Brennock, Julius Rosenthal, Emerson G. Orvis, Elias Greenebaum, Mary E. Orvis, John Somes, William P. Frailey, William Flannigan, Abraham Wilzinski, } In chancery.
2 S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third National Bank of S't Louis, James Q. Minschell, John P. Squire, Gerhard Foreman, Levi Abt, The International Bank, Charles S. Symonds, and Daniel Pratt, as assignee in bankruptcy of the People's Safe Deposit and Savings Institution of the State of New York.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-third day of July, A. D. 1874, came said complainant, by his solicitor, and filed in the office of the clerk of the circuit court of the United States for said district, at Chicago, in the district aforesaid, his bond for costs, and also at the same time filed his bill of complaint in said-entitled cause; which said bond for costs and bill of complaint are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, July term, A. D. 1874.

NATHAN POWELL
vs.
HENRY H. WALKER ET AL. } In chancery.

3 I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and, in default of pay-

ment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this twenty-third day of July, A. D. 1874.

JUNIUS MULVEY.

(Endorsed:) Filed July 23d, A. D. 1874. W'm H. Bradley, clerk.

4 *Bill of complaint.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the judges of the circuit court of the United States for the northern district of Illinois:

Nathan Powell, of the city of Madison, in the State of Indiana, and who is a citizen of the State of Indiana, brings this his bill of complaint against Henry H. Walker, Samuel J. Walker, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brannock, Brannock, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, Elias Greenebaum, John Somes, William P. Frailey, William Flanagan, Flanagan, Abraham Wilzinski, S. J. Marcus, John Miller, Atway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, and the Northwestern Fertilizing Company, a corporation existing under and by the laws of Illinois, and all of whom are citizens of the State of Illinois, and residents of said district,

5 and the Third National Bank of S't Louis, a corporation located and doing business in the city of S't Louis, in the State of Missouri, James Q. Minscholl, a citizen of the State of Ohio, residing at Columbus, in said State of Ohio, and John P. Squire, a citizen of the State of Massachusetts, residing at the city of Boston, in said State of Massachusetts.

And thereupon your orator complains and says: That on or about the thirteenth day of March, in the year of our Lord one thousand eight hundred and sixty-nine, the said Henry H. Walker and Samuel J. Walker, two of the above-named defendants, became and were indebted to your orator in the sum of forty thousand and five hundred dollars ($40,500.00), and being so indebted, in consideration thereof the said Henry H. Walker and Samuel Walker, on the day and year aforesaid, made their certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, twelve months after the date thereof, to the order of your orator, the sum of forty thousand five hundred dollars ($40,500.00) for value received, with interest from the day of the date thereof until paid, at the rate of ten per centum (10 %) per annum, and then and there delivered the said promissory note to your orator.

And your orator further shows unto your honor that the said Henry H. Walker afterwards, on or about the eighth day (8th) of April,

6 in the year of our Lord one thousand eight hundred and sixty-nine (1869), to secure the payment of the principal and interest mentioned in said note, executed and delivered to your orator his certain indenture of mortgage, under his hand and seal, bearing date the said eighth day of April, in the year of our Lord one thousand eight hundred and sixty-nine, and made or expressed to be made between the said Henry H. Walker as party of the first part, and your orator as party of

the second part, and that thereby, after reciting as therein mentioned, it was witnessed that for the better securing the payment of the money aforesaid with interest thereon, according to the tenor and effect of the said promissory note above mentioned, and also in consideration of the further sum of one dollar in hand paid by your orator, the receipt whereof was thereby acknowledged, the said Henry H. Walker did grant, bargain, sell, and convey unto your orator, his heirs and assigns, forever, all the following described lot, piece, or parcel of land, situate in the county of Cook, and State of Illinois, and known and described as follows, to wit, the northeast quarter of the southwest quarter of section number five (5) in township number thirty eight (38) north, range 14 east of the third principal meridian; together with all and singular the tenements,
7 hereditaments, privileges, and appurtenances thereunto belonging, or in anywise appertaining, to have and to hold said granted, bargained, and described premises, with the appurtenances, unto your orator, his heirs and assigns, to his and their only proper use, benefit, and behoof, but subject to the proviso therein contained; and said indenture of mortgage was upon the express condition, nevertheless, that if the said Henry H. Walker, his heirs, executors, or administrators, should well and truly pay or cause to be paid to your orator, his heirs, executors, or administrators, or assigns, the said principal sum of money mentioned in said promissory note, with interest thereon, at the time and in the manner specified in said note, according to the true intent and meaning thereof, that then, and in that case, the said indenture of mortgage and everything therein expressed should be absolutely null and void; all of which will more fully and at large appear by reference to said mortgage now in the possession of your orator and ready to be produced and proved as your honor shall direct, and to which for greater certainty your orator prays leave to refer.

And your orator further shows unto your honors that the execution and delivery of said indenture of mortgage was afterwards, to wit, on the 22nd day of May, A. D. 1869, duly acknowledged according to law by the said Henry H. Walker before John P. Olinger, a notary public
8 in and for, and residing in and for, the city of Chicago, in the county of Cook and State of Illinois, as will on reference to the certificate of acknowledgement thereof annexed to said mortgage, signed by John P. Olinger and attested by his notarial seal, more fully and at large appear, and to which, for greater certainty, your orator prays leave to refer.

And your orator further shows unto your honors that afterwards, to wit, on the 25th day of May, A. D. 1869, said indenture of mortgage was filed for record in the office of the recorder within and for the county of Cook aforesaid, and was duly recorded therein, in book 133 of mortgages, at page 40, as by the record of said mortgage in said office, and also by the certificate of Norman T. Gassette, recorder of said county, endorsed upon said indenture of mortgage signed by said Norman T. Gassette, as such recorder, as aforesaid, sufficiently appears, and to which said certificate thereof your orator prays leave to refer, if it be necessary for your orator so to do.

And your orator further shows unto your honors that on or about the 17th day of September, in the year A. D. 1870, your orator received as a payment of part of the principal sum of said note the sum of twenty thousand and five hundred dollars, and thereupon delivered his certain deed of release, of date September 12th, A. D. 1870, to said Henry H.
9 Walker, in and by which said deed your orator released from the lien of said mortgage the north half of said mortgaged premises,

and that your orator, upon receipt of such money, duly credited the same upon said note.

And your orator further shows unto your honors that afterwards, on or about the twelfth day of December, in the year A. D. eighteen hundred and seventy, your orator received the further sum of eight thousand dollars on account of principal sum of said note, and which said two sums of twenty thousand five hundred and eight thousand dollars, so paid as aforesaid, your orator has applied toward the payment of said mortgage debt and in reduction thereof, and has duly credited the same thereon, leaving, after deducting such credits at the date last aforesaid, a balance of twelve thousand dollars of the principal sum of said mortgage debt due, owing, and unpaid to your orator upon the security of the south half of said mortgaged premises.

And your orator further shows unto your honor that although said note has long since become due, neither the said Henry H. Walker nor the said Samuel J. Walker, nor any person or persons in their behalf, or in behalf of either of them, hath ever paid, or caused to be paid, to your orator the said balance of twelve thousand dollars of the said principal sum of forty thousand dollars and five hundred dollars of said promissory note, or any part thereof, nor the interest which has
10 accrued thereon since the 1st day of November, in the year A. D. eighteen hundred and seventy-two, or any part thereof, but the same still remains wholly due and unpaid to your orator, contrary to the proviso of said mortgage, and that thereby the estate of your orator in the south half of said mortgaged premises hath become absolute at law, and that your orator hath caused application frequently, and in a friendly manner, to be made to the said Henry H. Walker, and requested him to pay the said balance of said principal sum and interest to your orator, or else to release his equity of redemption in and to said south half of said mortgaged premises.

And your orator well hoped that such your orator's reasonable requests would have been complied with, as in justice and equity they ought to have been, but now so it is, may it please your honor, the said Henry H. Walker refuses so to do.

Your orator further shows unto your honors that said mortgaged premises, so remaining unreleased as aforesaid, are a very scanty and insufficient security for said balance of principal-money, with the interest remaining due and unpaid upon said mortgage.

And your orator further shows unto your honors that Brian Philpot, Adeline M. Philpot, his wife; John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, his wife; Sherman A. Ricker, Wirt Dex-
11 ter, John Brannock, Brannock, his wife; Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, John Somes, William P. Frailey, John P. Squires, William Flanagan, Flanagan, his wife; the Northwestern Fertilizing Company, Abraham Wilzinski, S. J. Marcus, John Miller, Atomy Watson, James Q. Minschall, Charles A. Belden, George Birkhoff, Mary Bond, the Third National Bank of St Louis, Abner Taylor, and Cyrus H. McCormick and Elias Greenebaum, the other of the defendants hereinbefore named, have, or claim to have, some interest in the said mortgaged premises, or some part thereof, either as subsequent purchasers, incumbrancers, judgement-creditors, or otherwise, and to be entitled to redeem the same, but they and also the said Henry H. Walker refuse so to do.

And your orator charges that the interest in the said mortgaged premises which the said Brian Philpot, Adeline M. Philpot, John G.

Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brannock, Patrick Brannock, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, John Somes, William P. Frailey, John P. Squire, William Flanagan. Flanagan, the Northwestern Fertilizing Company, Abraham Wilzinski, S. J. Marcus, John Miller, Atway Watson, James Q. Minschall, Cha's A. Belden, George Birkhoff, Mary Bond, the Third National Bank of S't Louis, Abner Taylor, Cyrus H. McCormick, & Elias Greenebaum have, if any they or either of them have in said premises, or any part thereof, accrued subsequent to the lien of the said mortgage to your orator, and is subject
12 thereto, and that the said defendants ought either to pay what is due to your orator as aforesaid, or to release their equity of redemption in said mortgaged premises, but they refuse so to do.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed for, full, true, and perfect answers make (not under oath, answers under oath being hereby waived) to all and singular the premises, as fully and particularly as if the same were hereinafter repeated, your orator prays that account may be taken, under the direction of this court, of what is due and owing to your orator for principal-money and interest on his said mortgage, and that said defendants may be decreed to pay to your orator what may be found due to him, on taking such account as aforesaid, together with his costs of this suit, by a short day to be appointed by this honorable court for that purpose, or, in default thereof, that said premises may be sold, by and under the direction of this court, according to the rules and practice of this court, and the proceeds of such sale be applied to the payment of the amount due your orator as aforesaid, together with all costs and expenses: and that the said Henry H. Walk*e*r and the other defendants, and all persons claiming under
13 them subsequent to the commencement of this suit, may be foreclosed and barred from all equity of redemption or claim of, in, and to the said mortgaged premises, and every part thereof: and that your orator may have such further and other relief in the premises as to your honors shall seem meet and the nature of this case may require,

May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to the said Henry H. Walker, Samuel J. Walker, Brian Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brannock, Brannock, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, John Somes, William P. Frailey, John P. Squire, William Flanagan. Flanagan, the Northwestern Fertilizing Company, Abraham Wilzinski, S. J. Marcus, John Miller, Atway Watson, James Q. Minschall, Charles A. Belden, George Birkhoff, Mary Bond, Third National Bank of S't Louis, Abner Taylor, Cyrus H. McCormick, Elias Greenebaum, thereby commanding them, and every of them, at a certain day, and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet: and your orator will ever pray, &c.

NATHAN POWELL,
By JUNIUS MULVEY,
His Solicitor.

(Endorsed:) Filed July 23rd, 1874. W'm H. Bradley, cl'k.

14 And on the same day, to wit, the 23d day of July, A. D. 1874, a writ of subpœna issued out of said clerk's office against said defendants in said-entitled cause, which said writ of summons, together with the memorandum, and also the return of the marshal annexed thereto, is in the words and figures following, to wit:

Writ of subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to Henry H. Walker, Samuel J. Walker, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brannock, Brannock, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, John Somes, William P. Frailey, William Flanagan, Ellen Flanagan, Abraham Wilzinski, S. J. Marcus, John Miller, Atway Watson, Charles A. Belden, George Bierkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, the Northwestern Fertilizing , the Third National Bank of St Louis, James Q. Minschell, and John P. Squire, Elias Greenebaum, greeting:

We command you, and every of you, that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of September next, to answer the bill of
15 complaint of Nathan Powell, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshall of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 23d day of July, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the 99th.

[SEAL.] WM H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly.

WM H. BRADLEY, *Clerk.*

I have served the within writ in the following manner, to wit: Upon Samuel J. Walker, William F. Coolbaugh, William P. Frailey,
16 John Miller, Otway Watson, Elias Greenebaum, & Brian Philpot, therein named, by delivering to each of them personally a true and correct copy of the same on the third day of August, A. D. 1874; upon Addie R. Coolbaugh, therein named, by delivering a true and correct copy of the same for her to Wm F. Coolbaugh, her husband, on the 3d day of August, A. D. 1874; upon Adeline Philpot, therein named, by delivering a true and correct copy of the same for her to Brian Philphot, her husband, on the 3d day of August, A. D. 1874; upon Wirt Dexter, therein named, by delivering a true and correct copy for him, on the 3d day of August, A. D. 1874, to M'rs M. Garcey, a free white person over the age of ten years, and a member of his family; upon Em-

erson G. Orvis and Mary E. Orvis, therein named, upon the 3d day of August, A. D. 1874, by delivering a true and correct copy of the same for each of them to Charles Orvis, a free white person over the age of ten years, and a member of their family; upon Henry H. Walker, therein named, by delivering a true and correct copy of the same to him personally on the 4th day of August, A. D. 1874; upon Heman G. Powers, therein named, by delivering a true and correct copy of the same to him personally on the 5th day of August, A. D. 1874; upon Sarah E. Powers, therein named, by delivering a true and correct copy of the same for her to Heman G. Powers, her husband, on the 5th day of August, A. D. 1874; upon Julius Rosenthal and Cyrus H. Mc-
17 Cormick, therein named, by delivering a true & correct copy of the same to each of them personally on the 10th day of August, A. D. 1874; upon Francis A. Hoffman and S. J. Marcus, therein named, by delivering a true copy of the same to each of them personally on the 11th day of August, A. D. 1874; upon William Flannagan and Ellen Flannagan, therein named, by delivering a true and correct copy of the same to each of them personally on the 15th day of August, A. D. 1874; upon the Northwestern Fertilizing Company, not having been able to find the president of said company, by reading the same to and delivering a true and correct copy thereof to R. W. Ralston, vice president of said company, on the 18th day of August, A. D. 1874; upon John G. Rogers, therein named, by delivering a true and correct copy of the same to him on the 19th day of August, A. D. 1874; upon Abraham Wilzinski, therein named, by delivering a true & correct copy of the same for him to J. Marcus, a free white person over the age of ten years, and a member of his family, on the 11th day of August, A. D. 1874.

I did not serve the other defendants therein named, having been unable to find them or that they had a residence in my district.

B. H. CAMPBELL,
U. S. Mar.
By A. C. CAMPBELL,
Deputy.

(Endorsed:) Filed Sept. 9th, A. D. 1874. W'm H. Bradley, Clerk.

18 And on this day, to wit, the 5th day of September, A. D. 1874, the following defendants, to wit, Emerson G. Orvis, Mary E. Orvis, John P. Squire, Elias Greenebaum, John Somes, William P. Frailey, Francis A. Hoffman, Julius Rosenthal, and Elias Greenebaum, filed their appearances in said-entitled cause, which said appearances are respectively in the words and figures following, to wit:

Appearance of Emerson G. Orvis et al.

UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court of the United States in & for said northern district.

NATHAN POWELL
vs.
EMERSON G. & MARY E. ORVIS, JOHN P. Squires, Elias Greenebaum, John Somes, and William P. Frailey, defendants, impleaded with Henry H. Walker et al.

I hereby enter my appearance for the respondents above named in above-entitled cause.

HUGH ALEXANDER, J'R,
Sol'r for said Orvis, Squires, et al.

CHICAGO, *Sep.* 5, 1874.

(Endorsed:) Filed Sept. 5, 1874. W'm H. Bradley, cl'k.

Appearance of Francis A. Hoffman, Julius Rosenthal, and Elias Greenebaum.

UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court of the United States in and for said northern district.

19 NATHAN POWELL
v.
HENRY H. WALKER, FRANCIS A. HOFFMAN, Julius Rosenthal, Elias Greenebaum, et als.

We hereby enter our appearance in said cause for said defendants, Francis A. Hoffman, Julius Rosenthal, and Elias Greenebaum.

ROSENTHAL & PENCE,
Solicitors for said Defendants.

(Endorsed:) Filed Sept. 5, 1874. W'm H. Bradley, cl'k.

And on the same day, to wit, the 7th day of September, A. D. 1874, said defendant, John G. Rogers, filed in said clerk's office his answer in said-entitled cause, which said answer is in the words and figures following, to wit:

Answer of John G. Rogers.

UNITED STATES OF AMERICA:

Circuit court of the United States, northen district of Illinois.

The separate answer of Jno. G. Rogers to a bill in chancery filed by Nathan Powell against Henry H. Walker & others.

This respondent says that he has no knowledge of the matters
20 and things set forth in said bill except as he is informed thereof by said bill, and that he has no knowledge of any claim or right, title, or interest which he may have in & to the land described in said bill, & upon which the complainant asserts title or lien. But he supposes that he may be a trustee or successor in trust in some deed or deeds made by some owner or claimant of said land, for the use and benefit of some other person or persons; and, if so, he leaves the cestui que trust to assert his or their rights. He has no knowledge of such trust, has never been advised thereof, so far as he knows or believes, and has never accepted it.

He reserves the right and prays the court to permit him, if necessary, to make further answer to said bill, when he is better informed and advised in the premises.

And now, having answered as fully as he is able to do, prays the court to protect the rights of any person who may be interested in the premises through him, and to save him from all costs, &c.

JNO. G. ROGERS, *Pro se.*

(Endorsed:) Filed Sept. 5th, 1874. W'm H. Bradley, cl'k.

Afterwards, on the 7th day of September, A. D. 1874, the said The Northwestern Fertilizing Company, by its solicitors, filed its appearance in said clerk's office in said entitled cause, which said appearance
21 is in the words and figures following, to wit:

Appearance of the Northwestern Fertilizing Company.

UNITED STATES OF AMERICA,
State of Illinois, Northern District of Illinois, ss:
United States circuit court in and for the northern district of Illinois, to the September term, A. D. 1874.

NATHAN POWELL
vs.
HENRY H. WALKER * * * * THE NORTHwestern Fertilizing Company et al. } In chancery.

And now comes the *The* Northwestern Fertilizing Company, one of the above-named respondents, by Bentley & Quigg, its solicitors, and enters its appearance in the above-entitled cause.

BENTLEY & QUIGG,
Sol'rs for the Northwestern Fertilizing Co.

(Endorsed:) Filed Sept. 7, 1874. W'm H. Bradley, cl'k.

22 Afterwards, to wit, on the 9th day of September, A. D. 1874, came the defendants, Emerson G. Orvis, Mary E. Orvis, John P. Squires, Elias Greenebaum, John Somes, and William P. Frailey, by their solicitor, and filed in said clerk's office their answer in said-entitled cause, which said answer is in the words and figures following, to wit:

Answer of Emerson G. Orvis et al.

In the circuit court of the United States for the northern district of Illinois. Of the September term, A. D. 1874.

UNITED STATES OF AMERICA,
State of Illinois, Northern District, ss:

NATHAN POWELL
vs.
HENRY H. WALKER, EMERSON G. ORVIS, MARY E. Orvis, John P. Squires, Elias Greenebaum, John Somes, and William P. Frailey, et al. } Chancery.

The joint and several answers of Emerson G. and Mary E. Orvis, John P. Squires, Elias Greenebaum, John Somes, and William P. Frailey, to the bill of complaint of Nathan Powell, herein filed.

These respondants, answering, say, that they are ignorant of all and every the matters and things in said bill of complaint alleged, concerning the execution and delivery of the note and mortgage-deed of
23 said Henry H. and Samuel J. Walker to said complainant, and of the amount of money due thereon, either as principal or for interest, and as to each of the allegations of said bill, concerning the same, respondants call for strict proof.

And respondents would, further answering, aver that said respondent, Emerson G. Orvis, on, to wit, February 4th, 1874, contracted with said Henry H. and Samuel J. Walker for the purchase of a piece of land known and described as the south one hundred feet of block sixteen, in Packer's subdivision of sec. (which is a part of the premises sought to be affected by complainant's bill, the premises mentioned in said complainant's bill having, since the execution of the mortgage to complainant, been subdivided and platted of record as "Packer's subdivision"), for the price of eight thousand dollars, and that shortly thereafter said Orvis received title to the same property by the warranty deed of said Henry H. Walker, and upon receipt thereof paid to said Walker the full amount of purchase-money, and that he owes nothing to said Walkers on account of said purchase; that said respondent Orvis had been furnished with an abstract of title to said property, which showed the record of the mortgage to complainant, as is alleged in the
24 bill of complaint herein; that respondent was advised by his counsel that the same was a valid, subsisting lien on said premises, and that both respondent and his attorney reported the same to said Walkers, who then and there represented that the said mortgage had been wholly paid, and would shortly be discharged of record, the party in interest to discharge the same being a non-resident; and that respondent then, relying upon the representations of said Walkers, closed the said purchase and received his said deed, and that he believed that said mortgage was wholly paid at said time, and knew nothing to the contrary until the bringing of complainant's bill here into court.

And respondents Frailey and Orvis would, further answering, show unto the court that, long prior to the purchase by said Orvis of said land, said Frailey had held and occupied the same under lease from said Walkers, and had made sundry valuable improvements thereon, and before said purchase had sold all his improvements and assigned his right, title, and interest in & to said leasehold to said Orvis. That said Orvis, to secure a deferred payment of purchase-money, executed a chattel-mortgage on said improvements to said Frailey, which mortgage has been wholly paid and discharged of record, which is the only interest of the said Frailey in the premises.

25 And co-respondent, Mary E. Orvis, disclaims all interest in, and to the premises sought to be affected herein, except such egal and vested rights as are accrued to appertain to her as the wife of respondent, Emerson G. Orvis.

And respondent further avers that after purchasing said property, said Orvis made valuable improvements thereon involving an outlay of above ten thousand dollars, and that he, on, to wit, February 8, 1874, executed a trust-deed, securing his note for four thousand dollars, payable to the order of Greenebaum & Foreman, of Chicago, to Elias Greenebaum, on said property, and which was given, intended, and accepted as a first lien on said property. And that also, subsequent to the execution of the Greenebaum trust, respondent Orvis executed to John Somes, a co-respondent, his trust-deed for said property (second and subject only to the said Greenebaum trust) to secure the sum of ten thousand dollars, payable to the order of said co-respondent, John P. Squires, who is alleged by said bill a citizen of the city of Boston, State of Massachusetts; the interest of said Greenebaum, Somes, and Squires, as above set out, being their only interest herein; that the said trust-deeds were both made and delivered by respondent Orvis under
26 the belief that the complainant's mortgage had been full paid and

discharged, and accepted by said Greenebaum, Somes, and Squires under the same belief.

And respondent would further aver, upon information and belief, that the property still subject to lien of complainant's mortgage is about six whole blocks of said subdivision, worth, at this time, about one hundred and fifty thousand dollars, upon which complainant's mortgage is the first lien, and respondents deny that the said six blocks upon which complainant's lien still exists is inadequate security for the sum alleged by him to be due, and avers, on the contrary, that the security is remarkably ample. And respondents further aver that the property of said Orvis is equal in extent to one-third of a block, and is about equal to an eighteenth part of the entire body of six blocks still subject to said mortgage, and that the said Walkers have still large parcels of the same unsold and unoccupied, some under leasehold and occupied; a part*e* of which unsold property and interest of said Walkers would more than pay the complainant's alleged *lein*.

And respondents further aver that said Walkers have since their sale and conveyance to respondent Orvis made other sales and conveyances to part*y*s unknown to respondents of the said property, subject
27 alike to complainant's first-mortgage lien, and that in equity the property of such subsequent purchasers should first be sold to apply on account of complainant's alleged indebtedness, and that the ownership of respondent Orvis, the liens of respondents Greenebaum, Somes, and Squires are greatly imperiled, and have been rendered in*e*ffective and subordinated to the lien of complainant; that in equity and of right the unsold interests of said Henry H. and Samuel J. Walker should first be sold and taken to satisfy any order or decree that upon hearing the report the honorable court should deem just, and that in case the said unsold interests of said Walkers prove insufficient to satisfy any such order or decree, that then the property of purchasers from them, subsequent to said respondent Orvis' purchase, should next be taken, and the property and liens of respondents preserved.

And respondents respectfully submit that an order of this honorable court requiring (upon the proofs of complainant's bill being made) the sale of any unsold interests of said Walkers in the premises included in complainant's mortgage, if any interest is shown, by the proofs first to be made, in such part or portions as are likely to produce satisfaction of such order or decree, and in case the unsold interests of said Walkers
28 property prove insufficient to extinguish complainant's lien, then to order the sale of the property of purchasers subsequent to the purchase by said respondent Orvis, which will tend to equity, and preserve the rights and just claims of respondents in the premises.

Respondents having no right of stay, or equities, other than here averred, against the relief sought and prayed for by complainant herein, and respondents pray hence to be dismissed, with their costs and charges in this behalf most wrongfully sustained.

EMERSON G. ORVIS,
MARY E. ORVIS,
JOHN P. SQUIRES,
ELIAS GREENEBAUM,
JOHN SOMES, A'D
WILLIAM P. FRAILEY,
By HUGH ALEXANDER, Esq., Jr.,
Their Solicitor.

(Endorsed:) Filed September 9th, 1874. W'm H. Bradley, cl'k.

29 Afterwards, to wit, on the 14th day of September, A. D. 1874, the following defendants, to wit, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, and Sarah E. Powers, by their solicitors, filed in said clerk's office their appearance in said-entitled cause; which said appearance is in the words and figures following, to wit:

Appearance of W'm F. Coolbaugh et al.

UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court of the United States in and for said northern district.

NATHAN POWELL
vs.
HENRY H. WALKER, WILLIAM F. COOLBAUGH, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, et al.

We hereby enter our appearance in said cause for said defendants, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, and Sarah E. Powers.

FULLER & SMITH,
Solicitors for said Defendants.

(Endorsed:) Filed Sept. 14, 1874. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 17th day of September, A. D. 1874,
30 the following defendants, to wit, William Flannagan and Flannagan, by their solicitors, filed in said clerk's office their appearance in said-entitled cause; which said appearance is in the words and figures following, to wit:

Appearance of William Flannagan and Flannagan.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL
vs.
WILLIAM FLANNAGAN AND FLANNAGAN, impleaded with Henry H. Walker, Samuel J. Walker, Bryan Philpot, Adeline Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. and Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, et al.

We hereby enter our appearance for the said William Flannagan and Flannagan in the above-entitled cause.

HERVEY, ANTHONY & GALT,
Sol'rs for said Flannagans.

(Endorsed:) Filed Sept. 17, 1874. W'm H. Bradley, cl'k.

And afterwards, to wit, on the 24th day of September, A. D. 1874, said complainant, by his solicitor, filed in said clerk's office his
31 replication to the answer of Emerson G. Orvis, Mary E. Orvis, John P. Squires, Elias Greenebaum, John Somes, and William P. Frailey, defendants in said entitled cause; which said replication is in the words and figures following, to wit:

Replication to answers of Emerson E. Orvis et al.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL
vs.
HENRY H. WALKER, EMERSON G. ORVIS, MARY E. Orvis, John P. Squires, Elias Greenebaum, John Somes, William P. Frailey, et al. } In chancery.

The replication of Nathan Powell, complainant, to the answer of Emerson G. Orvis, Mary E. Orvis, John P. Squires, Elias Greenebaum, John Somes, and William P. Frailey, defendants.

This repliant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by this repliant, without this, that any other matter or thing whatsoever in the said an-
32 swer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct; and humbly prays as in and by his said bill he hath already prayed.

JUNIUS MULVEY,
Complainant's Solicitor.

(Endorsed:) Filed Sept. 24, 1874. W'm H. Bradley, cl'k.

Afterwards, on the 5th day of October, A. D. 1874, said defendants, Samuel J. Walker and Henry H. Walker, by their solicitors, filed in said clerk's office their appearance in said entitled cause; which said appearance is in the words and figures following, to wit:

Appearance of Samuel J. Walker and Henry H. Walker.

In the United States circuit court, northern district of Illinois.

NATHAN POWELL
vs.
SAMUEL J. WALKER & HENRY H. WALKER.

We hereby enter our appearance for the defendants, Samuel J. &

Henry H. Walker, and ask the court for thirty days further time in which to plead.

33 JEWETT & ADAMS,
Defendants' Attorneys.

(Endorsed:) Filed Oct. 5, 1874. W'm H. Bradley, cl'k.

Afterwards, on the 8th day of October, A. D. 1874, a writ of subpœna issued out of said clerk's office against Bacon Wheeler, Sherman A. Ricker, John Brenock, Brenock, George Birkhoff, and Abner Taylor, impleaded with Henry H. Walker, defendants in said entitled cause; which said writ, with the memorandum and also the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Alias writ of subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to Bacon Wheeler, Sherman A. Ricker, John Brenock, Brenock, George Birkhoff, and Abner Taylor, impleaded with Henry H. Walker, greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of November next, to answer the bill of complaint of Nathan Powell, filed July 23, 1874, in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment
34 and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 8th day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the 99th.

[SEAL.] W'M H. BRADLEY, *Clerk.*

Memorandum.

The above named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed and a decree entered accordingly.

W'M H. BRADLEY, *Clerk.*

I have served the within writ in the following manner, to wit: Upon George Birkhoff, therein named, on the 10th day of October, A. D. 1874; also upon Bacon Wheeler, therein named, on the 12th day of October, A. D. 1874; also upon Sherman A. Ricker, therein named, on the 13th day of October, A. D. 1874; also upon Margaret Brannock, therein
35 named, on the 12th day of October, A. D. 1874, by personally delivering to each of them a true copy of the same on the aforesaid days. I also served the same upon the following-named defendants, not having been able to find them to serve personally, by leaving a true copy for each of them at their usual place of abode with a free white person

above the age of ten years and a member of their respective families, to wit: Upon Abner Taylor, on the 13th day of October, A. D. 1874, with Charles F. Dodge, clerk at the Grand Pacific Hotel: also upon John Brannock, on the 12th day of October, A. D. 1874, with Margaret Brannock, his wife.

B. H. CAMPBELL,
U. S. Marshal.
By A. C. CAMPBELL,
Deputy.

(Endorsed:) Filed Oct. 19th, A. D. 1874. W'm H. Bradley, clerk.

Afterwards, to wit, on the 6th day of October, A. D. 1874, the said defendant, The Third National Bank of S't Louis, by its solicitors, filed in said clerk's office its appearance in said entitled cause; which said appearance is in the words and figures following, to wit:

Appearance of the Third National Bank of S't Louis.

United States circuit court, northern district of Illinois. October term, A. D. 1874.

NATHAN POWELL
vs.
36 . HENRY H. WALKER, SAMUEL J. WALKER, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, The Third National Bank of S't Louis, et al. } In chancery.

And now comes the Third National Bank of S't Louis, one of the defendants named in the above-entitled cause, by Mattocks & Mason, its solicitors, and enters its appearance to said cause.

THIRD NATIONAL BANK OF S'T LOUIS,
By MATTOCKS & MASON,
Its Sol'rs.

(Endorsed:) Filed Oct. 6, 1874. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 8th day of October, A. D. 1874, said defendants, Otway Watson, James Q. Minshall, Charles A. Belden, and Mary Bond, by their solicitors, filed in said clerk's office their appearances in said entitled cause; which said appearances are respectively in the words and figures following, to wit:

Appearance of Otway Watson, James Q. Minshall, and Charles A. Belden.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the United States circuit court for the northern district of Illinois, of the October term, A. D. 1874.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, SAMUEL J. WALKER, Brian Philpot, Otway Watson, James Q. Minchall, Charles A. Belden, et al., defendants. } In chancery.

And now come the said Otway Watson, James Q. Minchell, and

Charles A. Belden, three of the defendants to the above entitled cause, by Wakeman & Wakeman, their solicitors, and enter their appearance to the said cause.

WAKEMAN & WAKEMAN,
Att'ys for Otway Watson, James Q. Minshall, & Cha's A. Belden.

(Endorsed:) Filed Oct. 8, 1874. W'm H. Bradley, cl'k.

Appearance of Mary Bond.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the United States circuit court for the northern district of Illinois, of the October term, A. D. 1874.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, MARY BOND, ET AL., DEFENDANTS. } In chancery.

And now comes the said Mary Bond, one of the defendants named in the bill of complaint filed in the above-entitled cause, by Picher,
38 McDaid & Wilson, her solicitors, and enters her appearance to said cause.

McDAID, WILSON & PICHER,
Att'ys for Mary Bond.

(Endorsed:) Filed Oct. 8, 1874. W'm H. Bradley, cl'k.

Afterwards, on the 26th day of October, A. D. 1874, said defendants, John Brennock, Patrick Brennock, Julius Rosenthal, and Joseph Tabor, by their solicitors, filed in said clerk's office their answer in said entitled cause, which said answer is in the words and figures following, to wit:

Answer of John Brennock, Patrick Brennock, Julius Rosenthal, and Joseph Tabor.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States, in and for the northern district of Illinois.

NATHAN POWELL
vs.
HENRY H. WALKER ET ALS.

The joint and several answers of John Brennock, Patrick Brennock, sued by the name of Brannock, Julius Rosenthal, and Joseph Tabor, four of the above named defendants to the bill of complaint filed herein:

These defendants, now and at all times hereafter saving and reserving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors,
39 uncertainties, and imperfections in the said bill contained, for an-

swer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say that they are informed and believe that the mortgage described in said bill was executed as herein alleged, but that they do not know how much remains unpaid.

They allege that by warranty deed bearing date March 8th, A. D. 1872, and recorded March 10th, A. D. 1872, in the recorder's office of Cook County, Illinois, Samuel J. Walker being the owner of block fifteen (15) in Packer's subdivision of the northeast ¼ of southwest ¼ of section 5, township 38 N., range 14 east, 3rd P. M., conveyed the same unto one Patrick Brennock, and that title thereto has since, by mesne conveyances, vested in the defendant, John Brennock; that it is the duty of said Samuel J. Walker to pay off said mortgage to Powell; that said Samuel J. Walker, on or about the 9th day of October, A. D. 1870, being the owner of block thirteen (13) in said Packer's subdivision, conveyed the same to one Brian Philpot, which deed of conveyance was recorded on the 9th day of October, A. D. 1870, in the recorder's office of Cook County, Illinois.

But your orators aver that said block thirteen (13) in reality belongs to said Samuel J. Walker, and that said conveyance was made without any valuable consideration, and that said Philpot does not claim to own the same.

40 And these defendants further aver that on or about the 5th day of September, A. D. 1873, said Samuel J. Walker, being the owner of block fourteen (14) in said Packer's subdivision, did sell and convey the same unto one Sherman A. Ricker, which said deed of conveyance was filed for record in the recorder's office of Cook County, Illinois, on the 5th day of September, A. D. 1873.

And your orators aver that said Samuel J. Walker is still the owner of said block eighteen (18) in said Packer's subdivision, subject to some right claimed therein by some of said defendants.

That after the execution of said mortgage unto said Powell said Henry H. Walker sold and conveyed the whole of the premises upon which said mortgage rested unto said Samuel J. Walker.

And that these defendants are entitled to have said mortgage security marshalled and to have the premises sold first for its satisfaction which still belongs unto said Walker, or which he may have sold subsequent to the record of the deed unto said Patrick Brennock.

And having now fully answered, they pray, &c.

ROSENTHAL AND PENCE,
Sol'rs for John Brennock, Patrick Brennock, Julius Rosenthal, and Joseph Tabor.

A. M. PENCE,
Of Counsel.

41 (Indorsed:) Filed Oct. 26, 1874. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 30th day of October, A. D. 1874, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs. } In chancery.
HENRY H. WALKER ET AL.

On motion of Rosenthal & Pence, solicitors, leave is given the Inter-

national Bank of Chicago, Gerhard Foreman, and Levi Abt to be made parties defendant to the original bill of complaint herein, and on like motion leave is given said International Bank of Chicago, Gerhard Foreman, and Levi Abt to file cross-bills herein.

And afterwards, to wit, on the 30th day of October, A. D. 1874, said defendant Levi Abt, by his solicitors, filed in said clerk's office his answer in said entitled cause; which said answer is in the words and figures following, to wit:

Answer of Levi Abt.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States for the northern district of Illinois.

42 NATHAN POWELL
vs.
HENRY H. WALKER, FRANCIS A. HOFFMAN, John Brennock, Brian Philpot, et al. } In chancery.

The answer of Levi Abt, one of the defendants in the above-entitled cause, to the bill of complaint filed herein of Nathan Powell, complainant.

This defendant, Levi Abt, saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereunto says:

That he admits the execution of said mortgage unto said Powell as in said bill set out, but as to the amount still due and remaining unpaid on said mortgage he does not know, and calls for strict proof in regard thereto.

Further answering, he says that on the 10th day of September, A. D. 1870, said Samuel J. Walker, who was then the owner of block thirteen (13) in Packer's subdivision of the northeast quarter of the southwest quarter of section five (5), township thirty-eight (38) north, of range thirteen (13) east, of the third p. m., in Cook County, Illinois, executed and delivered to one Brian Philpot a deed of conveyance of said block thirteen (13) for a valuable consideration; and that on the 9th day of December, A. D. 1870, said Brian Philpot, to secure a portion of
43 the purchase-money created in the sale of said premises unto him by the said Walker, made, executed, and delivered unto him, the said Samuel J. Walker, a certain promissory note, of which the following is a copy:

8,750.00.] CHICAGO, *September 10th*, 1870.

Two years after date, I promise to pay to the order of Samuel J. Walker eight thousand seven hundred and fifty dollars, at the Second National Bank, Chicago, Illinois, with value received, interest at eight (8) per cent. per annum.

(Signed) BRIAN PHILPOT.

That by a deed of trust bearing date September 10th, A. D. 1870, said Brian Philpot, further to secure the indebtedness so evidenced by said promissory note, which was a part of the purchase-money as aforesaid, executed and delivered unto one John G. Rogers, as trustee, a deed

of trust, whereby he conveyed unto said John G. Rogers said lot thirteen (13) in Packer's subdivision aforesaid, in trust, to secure the payment of said promissory note, and the indebtedness secured thereby, into whose hands soever said promissory note should come; which said trust-deed was duly executed and acknowledged, and was, on the 31st day of October, A. D. 1870, filed for record in the recorder's office of Cook County, Illinois, and was recorded therein in book 599 of deeds, on page 345; that afterwards, and before the maturity of said note so secured by said trust-deed, the same was endorsed by said Samuel J. Walker and was sold and delivered unto this defendant for a valuable consideration, and that he is now the owner thereof, and that said trust-deed so executed still remains as security therefor.

44

That at the time of the execution of said deed by said Samuel J. Walker unto said Brian Philpot, he, the said Walker, was the owner of blocks fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18) in Packer's subdivision aforesaid, all of which said blocks were at that time subject to the lien of said Powell mortgage as in the manner aforesaid, and that this defendant is entitled to have all of said blocks sold prior to the sale of said block thirteen (13) for the purpose of having said Powell mortgage satisfied. and asks that the court shall marshal said security accordingly; and now this defendant, having fully answered, prays to be hence dismissed, &c.

LEVI ABT,
By ROSENTHAL AND PENCE,
His Solicitors.

A. M. PENCE,
Sol'rs and of Counsel.

(Endorsed:) Filed Oct. 30, 1874. W'm H. Bradley, cl'k.

And on the same day, to wit, the 30th day of October, A. D. 1874, said defendant Levi Abt, by his solicitors, filed in said clerk's office his cross-bill in said entitled cause; which said cross-bill is in the words and figures following, to wit:

45

Cross-bill of Levi Abt.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States for the northern district of Illinois.

NATHAN POWELL
vs.
HENRY H. WALKER, FRANCIS A. HOFFMAN, John Brennock, Brian Philpot, et al. } In chancery.

The cross-bill of Levi Abt, one of the defendants in the above-entitled cause.

To the honorable the judges of the circuit court of the United States in and for the northern district of Illinois:

Levi Abt, of the city of Chicago, a citizen of the State of Illinois, brings this his cross-bill against the defendants hereinafter named.

And therefore your orator complains and says that he has answered the original bill in said cause.

That on the 27th day of July, A. D. 1872, one Samuel J. Walker, for a valuable consideration, executed and delivered unto the International Bank of Chicago a certain promissory note, of which the following is a copy, viz:

No. 2503.] [$7,000.

CHICAGO, *July* 27, 1872.

On the 25th day of April, 1873, in grace after date, for value
46 received, I promise to pay, at the office and to the order of the International Bank, the sum of seven thousand dollars, with interest at ten per centum per annum after due; and in case this note shall not be paid within ten days after maturity thereof, interest shall thenceforth be charged and paid at the rate of twenty per cent. per annum, such rate being agreed upon as the measure of liquidated damages for the non-payment hereof at maturity; having deposited with said International Bank as collateral to secure the payment hereof note Brian Philpot for $8,750, secured by trust deed to John C. Rogers, lot 13, Packer's sub. N. E. S. W. 5, 38, 14, which note I hereby give the legal holder of this note authority to sell, or any part thereof, on the maturity of this note, or at any time thereafter or before, in the event of said securities depreciating in value in the opinion of said holder, at public or private sale, at his discretion, without advertising the same or giving me any notice (notice is hereby expressly waived), and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interests due thereon, and also to the payment of all expenses attending the sale; also five per cent. as a brokerage or commission for selling the collaterals; and in case the proceeds of the sale of the said note shall not cover the principal, interest, and expenses, I promise to pay the deficiency forthwith after
47 such sale.

(Signed) SAMUEL J. WALKER.

That afterwards, and before the maturity of said note, said International Bank, for a valuable consideration, sold, endorsed, and delivered unto your orator said promissory note, and with it also delivered the security hereinafter mentioned and set out; that on the 10th day of September, A. D. 1870, said defendant, Brian Philpot, for a valuable consideration, executed and delivered unto said Samuel J. Walker a certain promissory note, of which the following is a copy:

$8,750.00.] CHICAGO, *September* 10*th*, 1870.

Two years after date, I promise to pay to the order of Samuel J. Walker eight thousand seven hundred and fifty dollars, at the Second National Bank of Chicago, Illinois, for value received, with interest at eight (8) per cent. per annum, payable annually.

(Signed) BRIAN PHILPOT.

And that, in order to secure said promissory note into whosesoever hands the same might come, the said Brian Philpot, being the owner of the premises hereinafter described, executed and delivered unto said John G. Rogers, one of the said defendants in said original bill, a deed of conveyance of block thirteen (13), in Packer's subdivision of the northeast quarter of the southwest quarter of section five (5), township thirty-eight (38) north, of range fourteen (14) east, of the third
48 P. M., in Cook County, Illinois, in trust, nevertheless, to secure the payment of said promissory note last as aforesaid; which said

trust-deed was duly executed and acknowledged by said Brian Philpot, and was on the 31st day of October, A. D. 1870, filed for record in the recorder's office of Cook County, Illinois, and recorded therein in book 599 of deeds, at page 345; that after the execution of said note and trust-deed as aforesaid, he, the said Brian Philpot, delivered the same to said Samuel J. Walker; and your orator avers that the indebtedness so evidenced and secured was for a part of the purchase-money of the premises in said trust-deed described. And your orator further avers that on the 24th day of July, A. D. 1872, said Samuel J. Walker, in order to secure the payment of said note of $7,000 so executed by him to the order of said International Bank, or to whose hands soever the same might come, delivered and pledged unto said bank said note so executed by said Philpot, together with the trust-deed securing the same. That both said notes are now due and payable; that no interest has ever been paid upon said note so executed by said Philpot, and that interest is due upon the note so executed by said Walker since September 22nd, A. D. 1873, and that the principal of both of said notes is due and payable, and that he has brought no suit at law for the purpose of collecting the same; and he further avers that he is en-
49 titled to have the premises so conveyed by said trust-deed, and the equity of redemption of said Brian Philpot and of all other persons holding an interest in said premises foreclosed; that the defendants in said original bill claim some interest in said premises, viz: Nathan Powell, W'm F. Coolbaugh, Ada R. Coolbaugh, his wife; Heman G. Powers, Sarah E. Powers, his wife; Samuel J. Wilson, Henry H. Walker, Brian Philpot, Adeline M. Philpot, his wife; John G. Rogers, Bacon Wheeler, Francis A. Hoffman, Sherman A. Ricker, Wirt Dexter, John Brannock alias Brennock, Patrick Brennock, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, John Somes, W'm P. Trailey, John P. Squire, W'm Flannigan, Northwestern Fertilizing Company, Abraham Wilzniski, S. J. Marcus, John Miller, Otway Wakon, James Q. Minschell, Chas. A. Belden, George Bickhoff, Mary Bond, Third National Bank of Saint Louis, Abner Taylor, C. H. McCormick, Elias Greenebaum, Gerhard Foreman, International Bank of Chicago; that whatever interest any of said parties have in said block thirteen (13) are subsquent to the interest so acquired by your orator, and subsequent to the filing of the trust-deed aforesaid, except the interest of said Nathan Powell.

To the end, therefore, that all of the above-named parties who
50 were parties to said original bill may be ruled to answer without oath—answer upon oath being hereby expressly waived—and that a decree may be entered herein ordering the sale of said premises, and that the same may be sold for the purpose of satisfying the indebtedness so due unto your orator, and that all the rights, title, and equity of redemption of all of the above-named defendants, and all other parties claiming under them, subsequent to the commencement of this suit, may be foreclosed in accordance with the usual practice of this court, and that your orator may have such further and such other relief in the premises as may be agreeable to equity and good conscience, and your orator will ever pray, &c.

LEVI ABT,
By ROSENTHAL AND PENCE,
His Solicitors.

A. M. PENCE,
Of Counsel.

(Endorsed:) Filed Oct. 30, 1874. W'm H. Bradley, cl'k.

And on the same day, to wit, the 30th day of October, A. D. 1874, said defendants, Elias Greenebaum and Gerhart Foreman, by their solicitors, filed in said clerk's office their answer in said entitled cause, which said answer is in the words and figures following, to wit:

Answer of Elias Greenebaum and Gerhart Foreman.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

51 Circuit court of the United States for the northern district of Illinois.

NATHAN POWELL
vs.
HENRY H. WALKER, FRANCIS A. HOFFMAN, John Brennock, Brian Philpot et al. } In chancery.

The answer of Elias Greenebum and Gerhart Foreman, two of the defendants above named to the bill of complaint filed herein by said Nathan Powell.

These defendants, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereunto say:

That on the first day of October, A. D. 1870, said Samuel J. Walker, being the owner of block sixteen (16) in Packer's subdivision of the northeast quarter of the southwest quarter of section five (5) aforesaid, made, executed, and delivered unto one Henry E. Pickett a warrantee-deed, whereby he conveyed said block sixteen (16) unto the said Pickett, which said deed was filed for record in the recorder's office of Cook County, Illinois, on the 5th day of October, A. D. 1870.

That on the same day said Pickett, in order to secure a portion
52 of the purchase-money aforesaid, executed and delivered unto one Bacon Wheeler a trust-deed of said premises to secure such indebtedness as remains due and unpaid, but how much still remains due these defendants are unable to state, but ask that the same may be determined upon the hearing of this cause.

That on the 26th day of February, A. D. 1874, said Samuel J. Walker entered into an agreement to sell unto one Emerson G. Orvis the south one hundred feet of said block sixteen (16), which agreement was filed for record in the recorder's office of Cook County, Illinois, on the 26th day of February, A. D. 1874, and that said Samuel J. Walker subsequently conveyed said premises unto Henry H. Walker, and that said Henry H. Walker, by warrantee deed, conveyed the same unto the said defendant, Emerson G. Orvis; that on the 26th day of February, A. D. 1874, said Emerson G. Orvis executed a certain promissory note, of which the following is a copy, viz:

$4,000.00.] CHICAGO, *February 26th*, 1874.

One year after date I promise to pay to my own order four thousand dollars, value received, with interest at the rate of eight (8) per cent. per annum, payable annually, payable at the office of Greenebaum and Foreman, Chicago.

(Signed) EMERSON G. ORVIS.

And in order to secure the same, executed and delivered unto
53 said Elias Greenebaum a trust-deed, whereby he conveyed the south one hundred feet of said block sixteen (16) unto him, the

said Elias Greenebaum, for the purposes aforesaid, which deed was duly executed & acknowledged, and was on the 9th day of April, A. D. 1874, filed for record in the recorder's office of Cook County, Illinois, and that afterwards the said note was endorsed by said Emerson G. Orvis, and was delivered unto said Samuel J. Walker for a full and valuable consideration, and that afterwards said Samuel J. Walker became indebted unto these defendants, Elias Greenebaum and Gerhard Foreman, doing business under the firm-name of Greenebaum and Foreman, and being so indebted, he, the said Walker, pledged the said note, with the trust-deed securing the same, as aforesaid, unto these defendants, and the same has ever since remained in their possession as a pledge or security for all the indebtedness of said Samuel J. Walker unto them.

And they further aver that the indebtedness of said Samuel J. Walker unto them is much greater than the amount of said promissory note, and they further aver that since the execution of said Powell mortgage, and its record as aforesaid he, the said Samuel J. Walker, became the owner of the entire tract of land so conveyed with said mortgage, and that the following portion of said tract has been sold and
54 conveyed by said Samuel J. Walker subsequent to the execution and delivery and filing for record of the said trust-deed to said Bacon Wheeler, and subsequent to the execution and filing for record of the said trust-deed of said Orvis unto said defendant Greenebaum, viz: Lots thirteen (13), fourteen (14), fifteen (15), seventeen (17), and eighteen (18), in said Packer's subdivision: and these defendants ask that in case a sale should become necessary of any portion of said premises for the purpose of paying and satisfying the said Powell mortgage, that the same may be sold in the inverse order of that in which the said Samuel J. Walker conveyed the same, and that the premises so pledged to secure the indebtedness so evidenced by said Orvis' note may not be sold if the other premises before mentioned shall be requisite for the paying and satisfying of the indebtedness due upon the said Powell mortgage, and that said indebtedness may be marshalled in accordance with the principles of equity.

And these defendants having now fully answered, pray to be hence dismissed, &c.

ELIAS GREENEBAUM AND
GERHARD FOREMAN,
By ROSENTHAL & PENCE,
Their Solicitors.

A. M. PENCE,
Of Counsel.

(Endorsed:) Filed Oct. 30, 1874. W'm H. Bradley, cl'k.

55 On the same day, to wit, the 30th day of October, A. D. 1874, said International Bank and Francis A. Hoffman filed in said clerk's office their answer in said-entitled cause; which said answer is in the words and figures following, to wit:

Answer of International Bank et al.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States for the northern district of Illinois.

NATHAN POWELL
vs.
HENRY H. WALKER, FRANCIS A. HOFFMAN, John Brennock, Brian Philpot, et al, } In chancery.

The answer of the International Bank and Francis A. Hoffman, two of the defendants above named, to the bill of complaint filed herein by Nathan Powell, complainant.

These defendants, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereunto say that on the 26th of September, A. D. 1870, Henry H. Walker executed a certain promissory note, of which the following is a copy:

$10,000.00.] CHICAGO, *September the 26th*, 1870.

Two years after date I promise to pay to the order of Samuel J. Walker ten thousand dollars, at the Second National Bank,
56 Chicago, Illinois, value received, with interest from date, at eight (8) per cent. per annum, payable annually.
(Signed) HENRY H. WALKER.

And thereupon said Samuel J. Walker, in order to secure the payment of said promissory note, into whosesoever hands the same might come, by trust-deed bearing date September 26th, A. D. 1870, executed and delivered unto said Francis A. Hoffman a certain deed of conveyance of the following-described premises, viz: Block fifteen (15) in Packer's subdivision of the northeast quarter of the southwest quarter of section five (5), township thirty-eight (38) north, range fourteen (14) east, of the third P. M., in Cook County, Illinois, in trust, nevertheless, to secure the payment of the said promissory note into whosesoever hands the same might come, as before alleged.

That Amanda M. Walker, the wife of said Samuel J. Walker, also signed said trust-deed with her husband, and that both of them duly acknowledged the same in accordance with law; that afterwards, on the 29th day of September, A. D. 1870, said trust-deed was filed for record in the recorder's office of Cook County, Illinois, and was recorded therein in book 599 of deeds at page 331; that said note was delivered unto said Samuel J. Walker at the time of the execution of said note as aforesaid, and he thereupon endorsed the same in blank, and
57 for a valuable consideration then and there, and for the purpose of securing the indebtedness then due by said Samuel J. Walker unto this defendant, The International Bank, then known and called as the International Mutual Trust Company, he, the said Samuel J. Walker, delivered said note so executed and endorsed unto said bank for the purpose aforesaid, and also for the purpose of securing any other sum of money in which the said Samuel J. Walker might thereafter become indebted unto said bank.

And these defendants, furthering answering, aver that the indebted-

ness so due unto said bank by said Samuel J. Walker at the time of the delivery and pledging of the said note as aforesaid, has never been paid, and the amount of said indebtedness is much greater than the amount of the note so secured by said trust-deed as aforesaid, and that said Samuel J. Walker is now indebted in a much greater sum unto said bank than the amount of said note so secured; that said note is due and payable unto this defendant, the said International Bank, but that the said Henry H. Walker, as well as said Samuel J. Walker, neglected and refused to pay the same in accordance with the terms of said note and the trust-deed securing the same; and that this defendant The International Bank is entitled to have the indebtedness due to it as aforesaid paid out of the proceeds of any sale that may be
58 made of said block fifteen (15), and that they are entitled to have said Powell mortgage marshalled in accordance with the rights of the parties; that the property in said Packer's subdivision which remains unreleased from said mortgage should be sold in the inverse order of the conveyance thereof by the said Samuel J. Walker to the different parties in interest.

And these defendants aver that the deeds of conveyance of all the blocks in said Packer's subdivision, and which form a portion of the premises unreleased from said Powell mortgage, have been sold and conveyed, and the deeds therefor have been filed for record subsequent to the conveyance by the said Samuel J. Walker unto said Francis A. Hoffman, as hereinbefore stated, viz, blocks fourteen (14), sixteen (16), seventeen (17), and eighteen (18); and they further aver that said Samuel J. Walker was the owner of the whole of said Packer's subdivision; that he took the same subject to the said Powell mortgage, and that he sold the same to the different parties, as before stated; and these defendants having now fully answered, pray to be dismissed, &c.

THE INTERNATIONAL BANK,
By ROSENTHAL AND PENCE,
Its Solicitors.

A. M. PENCE,
Of Counsel.

(Endorsed:) Filed Oct. 30, 1874. W'm H. Bradley, clerk.

59 And on the same day, to wit, the 30th day of October, A. D. 1874, said International Bank of Chicago, by its solicitors, filed in said clerk's office its cross-bill in said entitled cause, which said cross-bill is in the words and figures following, to wit:

Cross bill of the International Bank of Chicago.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States for the northern district of Illinois.

NATHAN POWELL
vs.
HENRY H. WALKER, FRANCIS A. HOFFMAN, John Brennock, Brian Philpot, et al. } In chancery.

Cross-bill of the International Bank of Chicago, one of the defendants in the above-entitled cause.

To the honorable the judges of said court:

Your orator, the International Bank of Chicago, respectfully repre-

sents unto your honors that it is a corporation duly organized under and by virtue of the laws of the State of Illinois; that it has answered the original bill in said cause.

That on September 26th, A. D. 1870, said Henry H. Walker, one of the defendants in said original bill, executed his certain promissory note, of which the following is a copy:

60 $10,000.00.] CHICAGO, *September 26th*, 1870.

Two years after date I promise to pay to the order of Samuel J. Walker ten thousand dollars, at the Second National Bank of Chicago, Illinois, value received, with interest from date at eight (8) per cent. per annum, payable annually.

(Signed) HENRY H. WALKER.

That, in order to secure the payment of said promissory note, into whosesoever hands the same might come, said Samuel J. Walker and Amanda M. Walker, his wife, executed and delivered unto said Francis A. Hoffman a certain deed of trust, conveying unto said Hoffman blocks numbered fourteen (14) and fifteen (15), in Packer's subdivision of the northeast quarter of the southwest quarter of section five (5), township thirty-eight (38) north, range fourteen (14) east, of the third p. m., in Cook County, Illinois, in trust, to secure the payment of said note as aforesaid, which said deed of trust was duly signed, executed, and acknowledged by said Samuel J. Walker and Amanda, his wife, and was filed for record in the recorder's office of Cook County, Illinois, on the 29th day of September, A. D. 1870, and was recorded there in book 599 of deeds, at page 331.

That, at the time of the execution of said deed of trust as aforesaid, he, the said Samuel J. Walker, was the owner of the premises last aforesaid, and that at the time of the execution of said promissory

61 note he, the said Henry H. Walker, delivered the said note unto said Samuel J. Walker, and that afterwards, viz, on the day of the date of said note and trust-deed he, the said Samuel J. Walker, being indebted unto the International Bank of Chicago, endorsed said note so delivered to him, and pledged the same with the said International Bank, which was then known as the International Mutual Trust Company, as security for the indebtedness of said Walker, then due unto said bank, and also as security for all other sums of money which might thereafter become due unto said bank from the said Samuel J. Walker.

That at the time of the pledging of said promissory note, he, the said Samuel J. Walker, was indebted unto your orator in a much larger sum of money than the note aforesaid, which amount still remains due and unpaid, and that since the time of the pledging thereof said Samuel J. Walker has become indebted unto your orator in a much larger sum of money, viz, a much larger sum than the amount of said note so pledged as aforesaid, and that all the said indebtedness of the said Samuel J. Walker remains due and unpaid unto your orator, and that said note executed by said Henry H. Walker has never been paid, nor has any interest thereon ever been paid, and that the same still remains wholly due and unpaid.

62 That since the delivery of said note as aforesaid unto your orator, the said Francis A. Hoffman executed a release of said block fourteen (14), described in said deed of trust, and that said block fifteen (15) still remains as security for said indebtedness.

That your orator is entitled to the money so due upon the said note of Henry H. Walker, but that no part thereof, either principal or interest

has ever been paid; that all of the parties in said original bill claim some interest in the premises aforesaid, viz: Nathan Powell; W'm F. Coolbaugh, Ada R. Coolbaugh, his wife; Heman G. Powers, Sarah E. Powers, his wife; Samuel J. Walker, Henry H. Walker; Brian Philpot, Adeline M. Philpot, his wife; John G. Rogers, Bacon Wheeler, Francis A. Hoffman, Sherman H. Ricker, Wirt Dexter; John Brannock, alias Brennock; Patrick Brennock, Julius Rosenthal, Emerson G. Owis, Mary E. Owis, John Somes, W'm Flannigan, Northwesten Fertilizing Company, Abraham Vilzuiski, S. J. Marcus, John Miller, Otway Watson, James Q. Minschell, Cha's A. Belden, George Bickhoff, Mary Bond, Third National Bank of Saint Louis, Abner Taylor, C. H. McCormick, Elias Greenebaum, Gerhard Foreman, and Levi Abt. That whatever interest they may have has been acquired subsequent to the filing for record of the trust-deed aforesaid, and subsequent to the accruing of the indebtedness so due unto your orator from said Samuel J. Walker: that your orator has never brought any action at law to recover the indebtedness due upon the said note of said Henry H. Walker.

63

To the end, therefore, that all the above-named parties except Nathan Powell, complainant, in said original bill mentioned as having an interest in said premises, may be made parties defendant hereto, and may be ruled to answer this cross-bill, and that they may full, true, and perfect answer make to all and singular the allegations in this bill contained, answer upon oath being hereby expressly waived, and that a decree may be entered by this court ordering the sale of said premises, and that the equity of redemption of all the above-named defendants, and all the interest of all the parties hereto may be foreclosed, and that they may have such other and further relief in the premises as may be agreeable to equity and good conscience, may it please the court to grant unto your orator the people's writ of subpœna, directed unto said Amanda M. Walker, impleaded, &c., commanding her to appear and defend in accordance with the practice of this court.

THE INTERNATIONAL BANK OF CHICAGO,
By ROSENTHAL AND PENCE,
Their Solicitors.

A. M. PENCE,
Of Counsel.

64 (Endorsed:) Filed Oct. 30, 1874. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 31st day of October, A. D. 1874, said complainant by his solicitor filed in said clerk's office his replication to the answers of John Brennock and Julius Rosenthal, which said replication is in the words and figures following, to wit:

Replication to answers of John Brennock and Julius Rosenthal.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL
vs.
HENRY H. WALKER ET AL.

The replication of Nathan Powell, complainant, to the answers of John Brennock and Julius Rosenthal:

This repliant, saving and reserving unto himself now and at all times

hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by this repli-
65 ant without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein well and hereby and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

JUNIUS MULVEY,
Complainant's Solicitor.

(Endorsed :) Filed October 31st, 1874. W'm H. Bradley, clerk.

Afterwards, to wit, on the 2d day of November, A. D. 1874, said defendant, Abner Taylor, by his solicitors, filed in said clerk's office his answer in said entitled cause, which said answer is in the words and figures following, to wit :

Answer of Abner Taylor.

UNITED STATES OF AMERICA,
State of Illinois, Northern District of Illinois, ss:

In the United States circuit court in and for the northern district of Illinois, October term, A. D. 1874.

NATHAN POWELL *vs.* HENRY H. WALKER, SAMUEL J. WALKER, THE NORTHWESTERN FERTILIZING COMPANY, * * * ABNER TAYLOR, et al.	In chancery.

66 The separate answer of Abner Taylor, one of the above-named defendants, to the bill of complaint of Nathan Powell, complainant:

This defendant, now and at all times hereafter saving and reserving to himself all objections to the sufficiency of said bill of complaint, for answer thereto or to such parts thereof as he is advised it is or are material for him to make answer thereto, answering, says :

That he is ignorant of all and every the matters and things in said bill of complaint alleged concerning the execution and delivery of the note and mortgage deed of said Henry H. Walker and Samuel J. Walker to said complainant, and of the amount due thereon as principal and interest, and as to each of the allegations concerning the same defendant calls for strict proof.

This defendant, further answering, says that the said Samuel J. Walker being the owner in fee simple of the northwest quarter (¼) of the southwest quarter (¼) of section five (5), township thirty-eight (38) north, of range fourteen (14) east of the third (3rd) principal meridian, situated in the county of Cook and State of Illinois, free from all incumbrances except only the mortgage (if any) to the said complainant,

caused a subdivision to be made thereof into twelve (12) blocks, numbered consecutively from seven (7) to eighteen (18) inclusive, the
67 south half (½) of said premises being included in blocks thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), as per the plat of said subdivision entitled the "Packer's subdivision of the N. E. ¼ of the S. W. ¼ of sec. 5, T. 38 N., R. 14 E. of 3rd P. M., and duly recorded in the office of the recorder of Cook County, Illinois, on the thirtieth day of September, A. D. 1870, in book 172 of maps, at page 25, reference thereto being had will more fully appear.

That on the 10th day of September, A. D. 1870, the said Samuel J. Walker, then being the owner in fee simple thereof, free from all incumbrances excepting only the said mortgage (if any) to the said Powell, by warranty deed of that date, and recorded in the office of the recorder of Cook County, Illinois, on the 9th day of December, 1870, sold and conveyed to one Brian Philpot block thirteen (13) of said Packer's subdivision, who, as defendant is informed and believes, and therefore states the fact to be, is now the legal and equitable owner of the same of record.

And this defendant further says that on the fourth (4th) day of April, 1874, this defendant recovered a judgment in the superior court of Cook County, Illinois, against the said Brian Philpot and one Henry E. Pickett for the sum of fourteen hundred and sixty-seven dollars and
68 sixty-three cents ($1,467.63) and costs of suit, as by the records of said court, reference thereto being had, will fully appear, which said judgment is an existing lien on said block thirteen (13), subject only to the lien, if any, of the said mortgage of the said Powell.

And this defendant further says that subsequent to the conveyance to the said Philpot, the said Samuel J. Walker, being the owner thereof in fee simple, sold and conveyed by warranty deed dated the first day of July, A. D. 1872, and recorded December 7th, A. D. 1872, in the office of the recorder of Cook County, Illinois, in book 202 of records, at page 102, his wife joining therein, lots twelve (12), fourteen (14), sixteen (16), eighteen (18), and the south one hundred and eighty-seven & $\frac{25}{100}$ ($187\frac{25}{100}$) feet of block number eight (8) of said Packer's subdivision to William F. Coolbaugh and Heman G. Powers, and that they, or their assigns, still own the same.

That by warranty deed dated the eighth day of March, A. D. 1872, and recorded in the office of the recorder of said Cook County on the tenth (10th) day of October, A. D. 1872, in book 131, at page 23, the said Samuel J. Walker and wife sold and conveyed block fifteen (15) of said subdivision to one Patrick Brenock, as by reference to said record of said deed will more fully appear.

69 This defendant, further answering, says that all of said blocks fourteen (14), fifteen (15), sixteen (16), and eighteen (18), and the south one hundred and eighty-seven & $\frac{25}{100}$ ($187\frac{25}{100}$) feet of said block eight, were sold and conveyed by the said Walker, subject to the lien of said mortgage, if any, to said complainant, and subsequent to the sale, date, execution, and recording of the said deed from the said Walker and wife to the said Philpot.

And this defendant, further answering, denies that the said six blocks is inadequate security for the sum alleged to be due the said complainant, but on the contrary avers that either one of said blocks is worth much more than the amount claimed by said complainant; and further avers that in equity the unsold portions of said tract covered by the said mortgage to said complainant, if any, should be first sold under said mortgage, and if none remains unsold then the property of such

purchasers from said Walker, subsequent to the said sale and conveyance to the said Philpot should first be sold to apply on account of complainant's alleged indebtedness in the inverse order of alienation, and the property of the said Philpot preserved.

And this defendant submits that upon the final hearing of this
70 cause an order should be entered therein, proof of the material allegations of the complainant's bill having been made for the sale, first of any unsold interest of said Samuel J. Walker and Henry H. Walker, in the premises included in complainant's said mortgage (if any there should be), and in case the said Walkers have no interest in said premises, and in case the unsold interests (if any) of said Walkers should prove insufficient to satisfy and extinguish complainant's said lien, then that the property of purchasers subsequent to the purchase by the said Philpot be sold in the inverse order of alienation by said Walker, so that the rights of this defendant may be preserved in the premises.

And this defendant having fully answered, prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained, &c.

ABNER TAYLOR,
By BENTLEY & QUIGG,
His Sol'rs.

BENTLEY & QUIGG,
Sol'rs for Def't Abner Taylor.

(Endorsed:) Filed Nov. 2d, 1874. W'm H. Bradley, cl'k.

On the same day, to wit, the 2d day of November, A. D. 1874, the said defendant The Northwestern Fertilizing Company, by its solicitors, filed in said clerk's office its answer in said entitled cause, which said answer is in the words and figures following, to wit:

71 *Answer of the Northwestern Fertilizing Company.*

UNITED STATES OF AMERICA,
State of Illinois, Northern District of Illinois, ss:

In the United States circuit court in and for the northern district of Illinois, October term, A. D. 1874.

NATHAN POWELL
vs.
HENRY H. WALKER, SAMUEL J. WALKER, THE Northwestern Fertilizing Company et al. } In chancery.

The separate answer of the Northwestern Fertilizing Company, a corporation organized and doing business under and by virtue of the laws of the State of Illinois, to the bill of Nathan Powell, complainant.

This defendant now and at all times hereafter saving and reserving to itself all objections to the sufficiency of said bill of complaint, for answer thereto, or to so much or such parts thereof as it is advised is or are material to answer, answering says:

That it is ignorant of all and every the matters and things in said bill of complaint alleged concerning the execution and delivery of the note and mortgage-deed of said Henry H. Walker and Samuel J. Walker to

is ignorant of all and every the matters and things in complain-
said complainant and of the amount due thereon, as principal and
72 interest, and as to each of the allegations concerning the same
defendant calls for strict proof.

This defendant, further answering, says that the said Samuel J. Walker being the owner in fee-simple of the northwest quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$) of section five (5), township thirty-eight (38) north, of range fourteen (14) east of the third (3d) principal meridian, situated in the county of Cook and State of Illinois, free from all incumbrances, except only the mortgage (if any) to the said complainant, caused a subdivision to be made thereof into twelve (12) blocks, numbered consecutively from seven (7) to eighteen (18) inclusive, the south half ($\frac{1}{2}$) of said premises being included in blocks thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), as per the plat of said subdivision, entitled the "Packer's subdivision of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 5, T. 38 N., R. 14 E. of 3rd P. M.," and duly recorded in the office of the recorder of Cook County, Illinois, on the thirtieth day of September, A. D. 1870, in book 172 of maps, at page 25, reference thereto being had will more fully appear.

That on the 2nd day of October, A. D. 1871, the said Samuel J. Walker, representing himself to be the owner in fee-simple of block seventeen (17) of said Packer's subdivision, free from all incumbrances, contracted
to sell the same to one Robert W. Ralston, who was the vice-
73 president and acting for and on behalf of this defendant, for the
sum of fifteen thousand dollars ($15,000), and by warranty deed bearing date the said second day of October, A. D. 1871, and recorded on the seventh (7th) day of September, A. D. 1872, in the office of the recorder of said Cook County, the said Walker and wife conveyed the said block seventeen (17) to the said Ralston, who by quit-claim deed bearing date the third (3d) day of October, A. D. 1871, and recorded on the said seventh day of September, A. D. 1872, conveyed the said block to this defendant, who is now in possession of the same under said deed, as by reference to the record of said deeds will more fully appear, and this defendant says that said Samuel J. Walker should pay said mortgage and protect this defendant therefrom.

And this defendant, further answering, says that by warranty deed dated July 1st, A. D. 1872, and recorded in the recorder's office of Cook County, Illinois, on the seventh (7th) day of December, A. D. 1872, in book 202 of records, at page 102, and subsequent to the conveyance to this defendant, the said Samuel J. Walker, his wife joining in said deed, sold and conveyed to William F. Coolbaugh and Heman G. Powers blocks seven (7), twelve (12), (13), fourteen (14), sixteen (16), eighteen (18), and the south one hundred eighty-seven and $\frac{25}{100}$ feet ($187\frac{25}{100}$
74 ft) of block number eight (8) of said Packer's subdivision, as by reference to the record of said deed will fully more appear.

That by warranty deed dated the eighth (8th) day of March, A. D. 1872, and recorded in the office of the recorder of said Cook County on the tenth (10th) day of October, A. D. 1872, in book 131, at page 23, the said Samuel J. Walker and wife sold and conveyed block fifteen (15) of said subdivision to one Patrick Brennock, as by reference to said record of said deed will more fully appear.

This defendant, further answering, says that all of said blocks, except said block seventeen (17) aforesaid, numbered from fourteen (14) to eighteen (18) inclusive and the south $187\frac{25}{100}$ feet of said block eight, were sold and conveyed by the said Walker, subject to the lien of said mortgage, if any, to said complainant, and subsequent to the sale and date, execution and recording of the said deed from the said Walker and wife to

said Ralston and from said Ralston to this defendant of block seventeen (17) aforesaid.

And this defendant, further answering, denies that the said six blocks is inadequate security for the sum alleged to be due the said complainant, but on the contrary avers that either one of said blocks is worth much more than the amount claimed by said complainant, and further
75 avers that in equity the unsold portions of said tract covered by the said mortgage to said complainant, if any, should be first sold under said mortgage, and if none remains unsold then the property of such purchasers from said Walker subsequent to the said sale and conveyance to this defendant, should first be sold to apply on account of complainant's alleged indebtedness in the inverse order of alienation, and the property of this defendant preserved.

And this defendant submits that upon the final hearing of this cause an order should be entered therein, proof of the material allegations of the complainant's bill having been made for the sale, first, of any unsold interest of said Samuel J. Walker or Henry H. Walker in the premises included in complainant's said mortgage (if any there should be), and in case the said Walkers have no interest in said premises, and in case the unsold interests (if any) of said Walkers should prove insufficient to satisfy and extinguish complainant's said lien, then that the property of purchasers, subsequent to the purchase by this defendant, be sold, in the inverse order of alienation by said Walker, so that the rights of this defendant may be preserved in the premises.

And this defendant having fully answered prays to be hence dismissed, with its costs and charges, in this behalf most wrongfully sustained.

76 THE NORTHWESTERN FERTILIZING COMPANY,
By BENTLEY & QUIGG, *its Sol'rs.*

BENTLEY & QUIGG,
Sol'rs for the Northwestern Fertilizing Company, Defendant.

(Endorsed:) Filed Nov. 2d, 1874. W'm H. Bradley, cl'k.

On the same day, to wit, the 2d day of November, A. D. 1874, said defendant Sherman A. Ricker, by his solicitors, filed in said clerk's office his answer in said entitled cause, which said answer is in the words and figures following, to wit:

Answer of Sherman A. Ricker.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court of the United States in & for said northern district of Illinois.

NATHAN POWELL
vs.
HENRY H. WALKER, SHERMAN A. RICKER & ALS. } In chancery.

The answer of Sherman A. Ricker, one of the defendants in the above-entitled cause.

This defendant, saving, reserving, &c., answering, says, that he

77 ant's said bill of complaint set forth touching the execution and delivery of the mortgage-deed and the note secured thereby by said Henry H. Walker and Samuel J. Walker to said complainant, and of the amount of money, if any, now due from said mortgagors, Henry H. and Samuel J. Walker, to said complainant, either as principal or interest, and as to each and every the said matters this defendant calls for strict proof.

This respondent, further answering, says that on or about the first day of July, A. D. 1872, the said Samuel J. Walker, and Amanda M. Walker, his wife, conveyed to William F. Coolbaugh and Heman G. Powers a portion of the premises in said bill of complaint described, to wit, blocks thirteen (13), fourteen (14), sixteen (16), eighteen (18), and the south one hundred and eighty-one $\frac{25}{100}$ feet of block in the south half of the northeast quarter of the southwest quarter of section number five (5), in township number thirty-eight (38) north, range fourteen (14), east of 3d principal meridian, all of which said blocks the said Coolbaugh and the said Powers now hold and claim under and by virtue of said deed of conveyance as this defendant is informed and believes, excepting block fourteen (14) now held and owned by this defendant.

This respondent, further answering, says that on or about the day of February, A. D. 1873, he purchased said block fourteen (14),
78 taking as evidence of title thereto a warranty-deed from said Samuel J. Walker & wife and a quit-claim deed from said Coolbaugh & wife and said Powers and wife. That at the time of so taking his said deed he was informed by said Walker and verily believed that the title to same was free and clear, and had no intimation to the contrary until the service of the bill herein upon him.

This defendant, further answering, says that since the service of said bill of complaint upon him, he has made enquiries respecting the title to said premises in said bill described, and finds that the mortgage aforesaid originally covered the entire south half of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section five, but that on the day of , A. D. 187 , the said Nathan Powell released the north half of said south half of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section five (5); and this defendant says that much of said property so covered by said mortgage has changed hands and ownership since said mortgage was placed upon it. That said property has raised in value to a large extent within the last few years. That this defendant is informed and believes that said Samuel J. Walker still holds an interest in a large portion of said premises, but of what proportion and what value this defendant is ignorant.

Defendant, further answering, says that since the purchase of
79 said block fourteen (14) he has erected on said block a packing-house, at a cost of between eighty and eighty-five thousand dollars. That previous to purchasing said block an abstract of title to same was furnished him by said Samuel J. Walker, and that he, this defendant, caused the same to be examined by skilled attorneys, who pronounced the title to same good in said Coolbaugh & Powers, from whom he purchased; and this defendant says that if it be indeed true that said block fourteen (14) is included in the premises covered by said mortgage of said complainant, then that such portion of said property as said S. J. Walker is still interested in should be made to respond said mortgage and not the premises of this defendant.

And this defendant, further answering, says that the mortgage aforesaid in said bill of complaint described covers blocks other than that so purchased by this defendant, and that, as aforesaid, transfers have

taken place from time to time, and this defendant is unable now to state who have or claim to have an interest in said mortgaged premises; and thereupon this defendant says that if said Sam'l J. Walker be found to have no interest in said premises, then the entire property covered by said mortgage should respond such sum as may be
80 found due on said mortgage, and all parties interested in the mortgaged estate should be, if they have not already been, made parties to this suit, and the encumbrance aforesaid equitably divided among them in proportion to their respective interests, or in such other manner as may be agreeable to equity and the rights of the respective parties herein.

And this defendant, further answering, says that he is informed and believes, and on his belief alleges the fact to be, that the said Sam'l J. Walker claims some interest in block eighteen in said south half of northeast quarter of northwest quarter of section five, and has within the past year made a contract of sale of the same to one Louisa M. Tillinghast for the sum of about twelve thousand dollars, which sum has not as yet been paid, in whole or in part, and defendant claims and says that said sum should be decreed to be paid to complainant herein in payment and satisfaction pro tanto for said mortgage-debt, should said block 18 be found to be the property of said Sam'l J. Walker.

And having fully answered said bill of complaint so far as he is advised it is material or necessary for him to answer the same, he prays to be hence dismissed with his reasonable costs and charges in this
81 behalf most wrongfully sustained.

SHERMAN A. RICKER.

(Endorsed:) Filed Nov. 2d, 1874. W'm H. Bradley, cl'k.

On the same day, to wit, the 2d day of November, A. D. 1874, said defendants, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, and Sarah E. Powers, by their solicitors, filed their joint and several answer in said entitled cause, which said answer is in the words and figures following, to wit:

Answer of William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, and Sarah E. Powers.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court of the United States in and for said district.

NATHAN POWELL *vs.* HENRY H. WALKER, W'M F. COOLBAUGH, ADDIE R. Coolbaugh, Heman G. Powers, Sarah E. Powers, et als.	In chancery.

The joint and several answer of William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, & Sarah E. Powers, four of the defendants in the above-entitled cause.

These defendants say they are and each of them is ignorant of all and every the matters & things in complainant's said bill of com-
82 plaint set forth, touching the giving of the mortgage and the note secured thereby, and the execution and delivering of the same

by Henry H. Walker and Samuel J. Walker to said complainant, and of the amount of money now due from said mortgagors, Henry H. & Samuel J. Walker, to said complainant, either as principal or interest, and as to each and every the said matters these respondents call for strict proof.

These respondents, further answering, say that on or about the first day of July, A. D. 1872, the said Samuel J. Walker and Amanda M. Walker, his wife, conveyed to said William F. Coolbaugh and Heman G. Powers a portion of the premises in said bill of complaint described, to wit, blocks 13, 14, 16, 18, and south $181\frac{25}{100}$ feet of block in the south half of the northeast quarter of the northwest quarter of section number five (5), in township number thirty eight (38) north, range fourteen (14) east, of 3d principal meridian; all of which said blocks, excepting block fourteen (14), the said Coolbaugh and the said Powers now hold and claim under and by virtue of said deed of conveyance.

These respondents, further answering, say that they are informed and believe, and on belief state the fact to be, that on or about the 9th day of February, A. D. 1874, the said Samuel J. Walker entered
83 into an agreement with one Louisa M. Tillinghast wherein and whereby said Walker agreed to convey to said Louisa M., for the sum of about eleven thousand six hundred (11,600) dollars, the south half (S. $\frac{1}{2}$) of block eighteen (18), being one of said blocks so as aforesaid conveyed to said respondents, Coolbaugh and Powers, and that thereupon, said Louisa M. Tillinghast entered into possession of said block eighteen, and proceeded to erect thereon a large building or packing house, at a cost of about eight thousand (8,000) dollars, and thereupon defendants say that they are informed and believe that the said sum of eleven thousand and six hundred (11,600) dollars has never been paid in whole or in part to said Walker. That the fact of said contract on the part of said Walker with said Louisa M. Tillinghast was unknown to these respondents, and each of them, as well as the fact of the erection of said building or packing-house by said Louisa M. Tillinghast; that these respondents and each of them is willing that the said contract of said Walker with said Louisa M. Tillinghast be carried out, provided the purchase-money aforesaid, to wit, eleven thousand six hundred dollars, with the accrued interest thereon, be applied to the payment in whole or in part of the amount, if any, which shall be found due to the complainant in his said note and mortgage, and the balance, if any, to be paid to these respondents, these respond-
84 ents hereby offering, in such event, to quitclaim to said Louisa M. Tillinghast all right, title, and interest in said premises, to wit, in the south half (S. $\frac{1}{2}$) of said block eighteen (18).

And these defendants, further answering, say that the mortgage aforesaid, in said bill of complaint described, covers blocks other than those conveyed to these defendants, Coolbaugh & Powers, and that from time to time transfers have taken place, and these respondents are unable now to state who have, or claim to have, interest in said mortgaged premises; and thereupon said respondents say that the entire property covered by said mortgage or trust deed should respond such sum as may be found due on said mortgage, and all parties interested in the mortgaged estate should be made parties to this suit, and the encumbrance aforesaid equitably divided among them in proportion to their respective interests, or in such other manner as may be agreeable to equity and the rights of the respective parties herein.

And having fully answered said bill of complaint so far as they are advised it is necessary for them and each of them to answer, they and

each of them pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAM F. COOLBAUGH,
ADDIE R. COOLBAUGH,
85 HEMAN G. POWERS,
SARAH E. POWERS,
By FULLER & SMITH,
Their Solicitors.

(Endorsed:) Filed Nov. 2d, 1874. W'm H. Bradley, cl'k.

On the same day, to wit, the 2d day of November, A. D. 1874, said complainant, by his solicitor, filed in said clerk's office his replication to the answer of William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, and Sarah E. Powers, which said replication is in the words and figures following, to wit:

Replication to answer of William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, and Sarah E. Powers.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, WILLIAM F. COOLbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, et al., def'ts. } In chancery.

The replication of Nathan Powell, complainant, to the answer of William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, and Sarah E. Powers, defendants.

86 This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by this repliant. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

JUNIUS MULVEY,
Complainant's Solicitor.

(Endorsed:) Filed Nov. 2d, 1874. W'm H. Bradley, cl'k.

On the same day, to wit, the 2d day of November, A. D. 1874, the said complainant, by his solicitor, filed in said clerk's office his

87 replication to the answer of the International Bank of Chicago and Francis A. Hoffman, in said entitled cause, which said replication is in the words and figures following, to wit:

Replication to answer of International Bank of Chicago and Francis A. Hoffman.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, THE INTERNATIONAL Bank of Chicago, Francis A. Hoffman, et al., defendants. } In chancery.

The replication of Nathan Powell, complainant, to the answer of the International Bank of Chicago and Francis A. Hoffman, defendants.

This repliant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by this repliant. Without this, that any other matter or thing whatsoever in
88 the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

JUNIUS MULVEY,
Complainant's Solicitor.

(Endorsed:) Filed Nov. 2nd, 1874. W'm H. Bradley, cl'k.

And on the same day, to wit, the 2d day of November, A. D. 1874, said complainant, by his solicitor, filed in said clerk's office his replication to the answer of Sherman A. Ricker in said entitled cause, which said replication is in the words and figures following, to wit:

Replication to answer of Sherman A. Ricker.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, SHERMAN A. RICKER, et al., defendants. } In chancery.

89 The replication of Nathan Powell, complninant, to the answer of Sherman A. Ricker, defendant.

This repliant, saving and reserving unto himself now and at all times

hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by this repliant. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

JUNIUS MULVEY,
Complainant's Solicitor.

(Endorsed:) Filed Nov. 2d, 1874. W'm H. Bradley, cl'k.

90 Afterwards, to wit, on the 3d day of November, A. D. 1874, said complainant, by his solicitor, filed in said clerk's office his replication to the answer of John G. Rogers in said entitled cause, which said replication is in the words and figures following, to wit:

Replication to answer of John G. Rogers.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, JOHN G. ROGERS, ET AL. } In chancery.

The replication of Nathan Powell, complainant, to the answer of John G. Rogers, defendant.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by this repliant.

Without this, that any other matter or thing whatsoever in the
91 said answer contained, material or effectual in the law to be replied to, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

JUNIUS MULVEY,
Complainant's Solicitor.

(Endorsed:) Filed Nov. 3d, 1874. W'm H. Bradley, cl'k.

On the same day, to wit, the 3d day of November, A. D. 1874, said complainant, by his solicitor, filed in said clerk's office his replication to the answer of Abner Taylor in said entitled cause, which said replication is in the words and figures following, to wit:

Replication to answer of Abner Taylor.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:
In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, ABNER TAYLOR, ET AL., defendants. } In chancery.

92 Replication of Nathan Powell, complainant, to the answer of Abner Taylor, defendant.

This repliant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by this repliant. Without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

JUNIUS MULVEY,
Complainant's Solicitor.

(Endorsed:) Filed Nov. 3d, 1874. W'm H. Bradley, cl'k.

93 And on the same day, to wit, on the 3d day of November, A. D. 1874, said complainant, by his solicitor, filed in said clerk's office his replication to the answer of the Northwestern Fertilizing Company in said entitled cause, which said replication is in the words and figures following, to wit:

Replication to answer of the Northwestern Fertilizing Company.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:
In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, THE NORTHWESTERN Fertilizing Company, et al., defendants. } In chancery.

The replication of Nathan Powell, complainant, to the answer of The Northwestern Fertilizing Company, defendant.

This repliant, saving and reserving unto himself now and at all times

hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by this repliant.

94 Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

JUNIUS MULVEY,
Complainant's Solicitor.

(Endorsed:) Filed Nov. 3d, 1874. W'm H. Bradley, cl'k.

Afterwards, on the 4th day of November, A. D. 1874, said Samuel J. Walker and Henry H. Walker, by their solicitors, filed in said clerk's office their answer in said entitled cause, which said answer is in the words and figures following, to wit:

Answer of Samuel J. Walker and Henry H. Walker.

In the United States circuit court, northern district of Illinois.

NATHAN POWELL
vs.
SAMUEL J. WALKER & HENRY H. WALKER et al.

The joint and several answer of Samuel J. Walker and Henry H. Walker, two of the defendants, to the bill of complaint of said

95 Nathan Powell, complainant.

These defendants now, and at all times hereafter, saving and reserving unto himself all and all manner of benefit and advantage of exception which can or may be taken to the many errors, uncertainties, and other imperfections of the said complainant's said bill of complaint, for answer thereto, or to so much and such parts thereof as this defendant is advised is material or necessary for them to make answer unto, answering, says:

They admit the making, execution, and delivery the said note in said bill described, and the execution, by the said Henry H. Walker, the said mortgage in the said bill described, and that the said indenture of mortgage was acknowledged by said Henry H. Walker, as in said bill alleged, and filed for record, as alleged in said bill.

They admit the payments on account of said note alleged in said bill, and that the said complainant executed the release therein set out.

But these defendants deny that there is now due on the principal sum of said mortgage debt a balance of twelve thousand dollars, or any balance whatever. But, on the contrary, they aver that large sums of money have been paid by the defendant to the said complainant, on account of the said principal debt, other than those mentioned as

96 being credited thereon in said bill, which ought to be credited upon the said principal sum, and that when such sums are credited upon said principal sum the same will be wholly cancelled.

And these defendants deny that the south half of the premises described in said bill and mortgage are scanty and insufficient security for the sum of twelve thousand dollars, but, on the contrary, they aver that they would be abundant security for a much larger sum.

These defendants, having answered all the allegations of said bill necessary for them to make answer unto, pray to be herein dismissed with their reasonsble costs.

SAMUEL J. WALKER,
HENRY H. WALKER,
By JEWETT & ADAMS,
Att'ys for Defendants.

(Endorsed:) Filed Nov. 4, 1874. W'm H. Bradley, cl'k.

And on the same day, to wit, the 4th day of November, A. D. 1874, said complainant, by his solicitor, filed in said clerk's office his replication to the answer of said Henry H. Walker and Samuel J. Walker in said entitled cause, which said replication is in the words and figures following, to wit:

97 *Replication to answer of Henry H. Walker and Samuel J. Walker.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, SAMUEL J. WALKER, ET al., defendants.

The replication of Nathan Powell, complainant, to the answer of Henry H. Walker and Samuel J. Walker, defendants.

This repliant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied to by this repliant. Without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

98 All which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

JUNIUS MULVEY,
Complainant's Solicitor.

(Endorsed:) Filed Nov. 4, 1874. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 5th day of November, A. D. 1874, in the adjourned October term of said court, in the record of the proceedings

thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs.
HENRY H. WALKER, SAMUEL J. WALKER, Brian Philpot, Adeline M. Philpot, John G. Rogers, et al. } In chancery.

Now comes the complainant, by his solicitor, and it appearing to the court that the defendants, Brian Philpot, Adeline M. Philpot, Bacon Wheeler, Wirt Dexter, William Flanagan, Ellen Flanagan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Bierkhoff, Mary Bond, Cyrus H. McCormick, the Third
99 National Bank of S't Louis, and James Q. Minschell, had been duly served with process or had entered their appearance herein, but had failed to answer the bill of complaint herein in conformity with the rules and practice of the court, and they being now each three times solemnly called, come not, but make default; it is thereupon considered by the court that the defaults of said defendants, Brian Philpot, Adeline M. Philpot, Bacon Wheeler, Wirt Dexter, William Flanagan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Bierkhoff, Mary Bond, Cyrus H. McCormick, the Third National Bank of S't Louis, and James Q. Minschell, be entered, and that the bill of complaint and the matters and things therein contained be taken as confessed and true as against them.

And on motion of complainant, by his solicitor, it is ordered by the court that this cause be referred to Henry W. Bishop, esq., master in chancery of this court, to take proofs herein and to report the same to the court.

Afterwards, to wit, on the 30th day of November, A. D. 1874, said defendants, Elias Greenebaum and Gerhard Foreman, filed in said clerk's office their amended answer in said-entitled cause, which said amended answer is in the words and figures following, to wit:

Amended answer of Elias Greenebaum and Gerhard Foreman.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

100 Circuit court of the United States for the northern district of Illinois.

NATHAN POWELL
vs.
HENRY H. WALKER, FRANCIS A. HOFFMAN, John Brennock, Brian Philpot, et al. } In chancery.

The amended answer of Elias Greenebaum and Gerhard Foreman, two of the defendants above named, to the bill of complaint filed herein by said Nathan Powell.

These defendants, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereunto say they admit the execution of said Powell mortgage, but as to the amount due they are not informed, and leave complainant to prove the same; and they further

aver and show that said Samuel J. Walker, being the owner by deed bearing date November 25th, 1872, conveyed unto one John D. Kenney block sixteen (16), in Packer's subdivision of the northeast quarter of the southwest quarter of section five (5) aforesaid, described in said bill, which deed was duly filed for record on the 2nd day of December, A. D. 1872. That after the execution of said Powell mortgage said
101 blocks thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), were conveyed unto said Samuel J. Walker by the legal owner thereof, and said Walker then and there covenanted to assume and pay off said mortgage.

That since the sale and conveyance of said block sixteen (16) unto said John D. Kenney and the filing of said deed to him for record as aforesaid, said Samuel J. Walker has sold and conveyed said block fourteen (14) and eighteen (18), in said Packer's subdivision.

That said John D. Kenney being so the owner of block sixteen (16), and in order to secure a part of the purchase-money therefor, executed his certain promissory note, bearing date November 25th, A. D. 1872, being for the sum of twelve thousand dollars ($12,000), due on or before three years after date, with interest at eight per cent. per annum, and so being the owner of said block, in order to secure said purchase-money so evidenced by said note, executed his certain trust-deed unto said John G. Rogers, a trustee, and thereby conveyed unto him by such trust-deed said block sixteen (16), which said trust deed being duly executed by said Kenney was filed for record in the recorder's office of Cook County, Illinois, on the 23rd day of October, A. D. 1873, and was recorded in said office in book 266 of records, at page 453.

102 That said note so secured by said trust deed is now owned and held by these defendants for a valuable consideration.

That they are entitled to have that portion of said premises so encumbered by said Powell mortgage, which was conveyed by said Samuel J. Walker, subsequent to the record of said deed, to John D. Kenney, first sold to satisfy said Powell mortgage, and that said block sixteen (16) should only be sold in case said Powell mortgage shall not be satisfied by the sale of the premises subsequently conveyed by said Walker.

That subsequent to the record of said Kenney trust-deed as aforesaid, the south one hundred (100) feet of said block sixteen (16) was released from the effect of said Kenney trust-deed, but they aver that no part of the note so executed by said Kenney has ever been paid.

And they further aver that on the 24th day of February, A. D. 1874, said Emerson G. Orvis executed his certain promissory note of that date, being for the sum of four thousand dollars ($4,000), due one year after date, with interest at eight per cent. per annum, and that in order to secure the same said Orvis, who was the owner of said south one hundred (100) feet under said Kinney, conveyed the same in trust unto said Elias Greenebaum, trustee, which said trust deed was filed
103 for record in the recorder's office of Cook County, Illinois, on the 9th day of April, A. D. 1874; and that said Orvis did then and there endorse said notes so executed by him, and delivered the same unto these defendants as collateral security for said Kinney note.

And these defendants ask to be protected in the premises, and having now fully answered they pray to be hence dismissed, &c.

ELIAS GREENEBAUM AND
GERHARD FOREMAN,
By ROSENTHAL AND PENCE,
Their Sol'rs.

ROSENTHAL & PENCE, *Sol'rs, and of Counsel for said Defendants.*

I consent to filing hereof as amendment to the answer of Greenebaum and Foreman.

JUNIUS MULVEY,
Sol'r for Compl't.

(Endorsed:) Filed Nov. 30, 1874. W'm H. Bradley, cl'k.

And on the same day, to wit, the 30th day of November, A. D. 1874, in the adjourned October term of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs. } In chancery.
HENRY H. WALKER ET AL.

104 On motion of Rosenthal & Pence, solicitors, it is ordered by the court that the cross-bill of Levi Abt and the International Bank be dismissed; and thereupon leave is given the defendants, Elias Greenebaum and Gerhard Foreman, to amend their answer herein.

Afterwards, on the 9th day of January, A. D. 1875, in the December term, A. D. 1874, of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs. } In chancery.
HENRY H. WALKER ET AL.

On motion of William C. Grant, esq., solicitor, leave is given to S. Simons and Daniel Pratt, assignee of People's Safe Deposit and Trust Company of New York, to be made parties defendant herein, with leave to answer the bill by Monday next.

Afterwards, to wit, on the 11th day of January, A. D. 1875, said defendants, Charles S. Symonds and Daniel Pratt, filed in said clerk's office their answer in said-entitled cause, which said answer is in the words and figures following, to wit:

105 *Answer of Charles S. Symonds and Daniel Pratt.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois. In equity.

The joint and several answer of Charles S. Symonds and Daniel Pratt, as assignees in bankruptcy of the People's Safe Deposit & Savings Institution of the State of New York, to the bill of complaint of Nathan Powell against Henry H. Walker, Samuel J. Walker, Brian Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brannock, Brannock, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, Elias Greenbaum, John Somes, William P. Frailey, William Flannagan, Flannagan, the Northwestern Fertilizing Company, Abraham Wibzinski, S. J. Mowens, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abram Tayler, Cyrus H. McCormick, and the Third National Bank of S't Louis.

These defendants, now and at all times hereafter reserving unto themselves all and all manner of benefit and advantage to be had or

taken to the many errors and uncertainties of the said bill of complaint, for answer thereunto, or to so much and such parts thereof as these defendants are advised is or are necessary or material for them to make answer unto, answering, say:

106 That they admit that on or about the 13th day of March, in the year 1869, the said defendants Henry H. Walker and Samuel J. Walker made their certain promissory note in writing, bearing date the day and year aforesaid, and in and by the same promised, twelve months after the date thereof, to pay to the order of the said complainant the sum of forty thousand five hundred dollars for value received, with interest at the rate of ten per cent. per annum, as in that behalf alleged in said bill of complaint.

And these defendants, further answering, admit that the said Henry H. Walker, on or about the 8th day of April, in the year 1869, for the purpose of securing the payment of the principal and interest of the said promissory note above named, made, executed, and delivered his certain indenture of mortgage, under his hand and seal, bearing date the day and year last aforesaid, to the said complainant, and that therein and thereby the said Walker did grant, bargain, sell, and convey unto the said complainant, his heirs and assigns, the following-described parcel of land, situated in the county of Cook and State of Illinois, to wit, the northeast quarter of the southwest quarter of section five (5), in township thirty-eight (38) north, range fourteen (14) east, of the third principal meridian, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or appertaining; to have and to hold said above-described premises unto the said complainant, his heirs and assigns, but subject to the

107 proviso contained in the said indenture of mortgage, upon the express condition that if the said Henry H. Walker, his executors or administrators, should pay or cause to be paid to the said complainant, his executors, administrators, or assigns, the principal sum mentioned in said promissory note, with the interest thereon, in the manner specified therein, that then and in that case the said indenture of mortgage should be absolutely null and void, as in that behalf is stated in said bill of complaint.

These defendants, further answering, admit that the said mortgage was duly acknowledged and filed for record in the recorder's office for said county of Cook, and recorded in book 133 of mortgages, at page 40, as in that behalf is stated in said bill of complaint.

These defendants, further answering, say that they have no personal knowledge of the making and filing of said mortgage, or of the payments thereon, but are willing to admit that on or about the 10th day of September, 1870, the said complainant received as a payment of part of the principal sum of said note the sum of twenty thousand and five hundred dollars, and that the said complainant thereupon executed and delivered a release to said Henry H. Walker, bearing date September 12th, 1870, in and by which said release deed the said complainant did release from the lien of said mortgage the north half of said mortgaged premises, and that said sum of principal was

108 duly endorsed upon the said promissory note.

And these defendants, further answering, admit that afterwards, and on or about the 12th day of December, 1870, the said complainant received the further sum of eight thousand dollars on account of the principal sum of said note, and that both of said above-named sums have been applied to the payment of said mortgage debt and in reduction thereof.

And these defendants, further answering, say that whether the above-named sums are all that have been paid upon the said promissory note they have no information except such as they have derived from the said bill of complaint, and therefore leave the said complainant to make such proof concerning his said allegations and concerning the amount now due upon said promissory note as he may be advised.

And these defendants, further answering, aver and show to the court that, on or about the first day of October, 1870, Henry E. Pickett, one of the defendants in this suit, to secure the payment of the sum of seven thousand and five hundred dollars, with interest, did make, execute, and deliver unto the said Samuel J. Walker, also one of the defendants in this cause, his certain promissory note bearing date on that day, payable three years after the date thereof, to the order of the said Samuel J. Walker, for the sum of seven thousand five hundred dollars, at the Second National Bank of Chicago, value received, with interest
109 from date at eight per cent. per annum, payable annually, as by the said promissory note, ready to be produced as this court shall direct, will, on reference thereto, more fully appear.

And these defendants, further answering, say that the said Henry E. Pickett, on or about the date last aforesaid, being seized in fee-simple of the premises next hereinafter described, for the purpose of securing the payment of the said sum of money mentioned in said promissory note, together with the interest which should accrue thereon, did, on the day and year last aforesaid, duly execute, under his hand and seal, acknowledge and deliver unto Bacon Wheeler, of said Chicago, also one of the defendants in this cause, his certain deed of trust, bearing date the same day, in and by which said deed of trust the said Henry E. Pickett did grant, bargain, sell, alien, convey, and confirm unto the said Bacon Wheeler, as such trustee, his heirs and assigns forever, all the premises situated in the county of Cook and State of Illinois, and known and described as follows, to wit: Block number seventeen (17), in Packer's subdivision of the northeast quarter of the southwest quarter of section five (5), in township thirty-eight (38) north, range fourteen (14) east, of the third principal meridian, to have and to hold the same, unto the said Bacon Wheeler, as such trustee, his heirs, assigns or successors, in trust forever; but upon the trust, nevertheless, that in case of default in the payment of the said promissory note, or of a breach of any of the covenants or stipulations in the said trust-
110 deed contained, that said last-named premises might be sold under the power of sale in the said trust-deed contained.

And these defendants aver that the said described lot is parcel of the premises described in the bill of complaint and whereof foreclosure is sought by the said complainant.

And these defendants, further answering, aver that the said trust-deed was, on or about the date thereof, duly acknowledged by the said Henry E. Pickett, and delivered, and on or about the fifth day of October, 1870, filed for record in the recorder's office of said Cook County, and recorded in book 589 of deeds, at page 351, and refiled for record November 15th, 1871, and recorded in book 18 of records, page 47, and that the said promissory note specified in the said deed of trust was given to secure a part of the purchase-money of the premises in the said trust-deed described, as by the same now remaining in the possession of these defendants will, on reference thereto, more fully appear.

And these defendants, further answering, aver that, on or about the first day of October, 1870, the said Henry E. Pickett, to secure the pay-

ment of the further sum of seven thousand five hundred dollars, with interest, did make, execute, and deliver unto the said Samuel J. Walker his certain other promissory note, bearing date the day and year last aforesaid, and payable two years after the date thereof, to the order of the said Samuel J. Walker, for the sum of seven thousand five hundred dollars, at the Second National Bank of Chicago, for value received,
111 with interest from the date thereof at the rate of eight per cent. per annum, payable annually, and the said Henry E. Pickett, on or about the day last aforesaid, being then seized in fee-simple of the premises next hereinafter described, subject only to the mortgage of the said complainant in this suit, in order to secure the payment of the said sum of money, together with the interest thereon, did duly execute, under his hand and seal, acknowledge and deliver to the said Bacon Wheeler, as trustee, his certain deed of trust bearing date on the day and year last aforesaid, and did therein and thereby grant, bargain, sell, alien, release, and convey unto the said trustee, his heirs, assigns, and successors, in trust forever, all the premises situate in the county of Cook and State of Illinois—known and described as follows, to wit: Block number eighteen (18), in Packer's subdivision of the northeast quarter of the southwest quarter of section five (5), in township thirty-eight (38) north, range fourteen (14) east, of the third principal meridian, to have and to hold the same unto said Bacon Wheeler, as trustee, his heirs, assigns or successors in trust, upon certain trusts and conditions therein specified, with the usual powers of sale.

And these defendants aver that said trust-deed and said promissory note were given to secure a part of the purchase-money of the premises in the said trust-deed described; and that the said trust-deed
112 was duly acknowledged, on or about the day of date thereof, and subsequently, on or about the fifth day of October, 1870, filed for record in the recorder's office of said county, and recorded in book 399 of deeds, page 353, and refiled November 15th, 1871, and recorded in book 48 of records, page 49, as by the said note and trust-deed now remaining in these defendants' hands will, on reference thereto, more fully appear.

And these defendants, further answering, say that the said Samuel J. Walker, the payee in each of the said promissory notes, subsequently, and prior to October 1st, 1871, and prior to the maturity of either of said notes, endorsed and delivered said notes to these defendants as such assignees, or to the assignor of these defendants, to wit, the People's Safe Deposit and Savings Institution of the State of New York.

And these defendants, further answering, aver that, subsequently and on or about the 13th day of March, 1874, the said People's Safe Deposit and Savings Institution was duly declared a bankrupt at a court of bankruptcy held in and for the northern district of New York, in the city of Utica and State of New York, and the said promissory notes and trust deeds were duly assigned to these defendants as such assignees.

And these defendants, further answering, aver that no payment has been made upon the said promissory notes, or either of them, except the first year's interest, and that the same remain wholly due and
113 unpaid, with interest thereon from the 1st day of October, A. D. 1871.

And these defendants, further answering, aver that said premises described in said bill of complaint have, since the making of the mortgage in said bill of complaint mentioned, been subdivided into numerous lots and blocks, and that such lots and blocks have been sold and

conveyed also since the making of the said mortgage to various parties, and these defendants aver and insist that if the said premises in the said bill of complaint described are sold for the purpose of making the amount due under said mortgage in said bill of complaint described, that the same ought to be sold in the smallest subdivisions thereof made in said subdivision, and ought to be sold in the inverse order of their alienation.

And these defendants further aver that they have well and sufficiently answered all and singular the allegations in the said bill of complaint contained, and that without this all matters and things therein stated and charged, not sufficiently answered, admitted, denied, or traversed, are true.

All which matters and things these defendants are ready to aver, prove, and maintain, as this honorable court shall direct, and pray to be hence dismissed, with their costs and charges in this behalf most wrongfully sustained.

CHARLES S. SYMONDS &
DANIEL PRATT,
114 *Assignees in Bankruptcy of the People's Safe Deposit & Savings Institution of N. Y.*,
By GRANT & SWIFT,
Their Sol's.

GRANT & SWIFT,
Sol's, & of Counsel for Pratt & Symonds.

(Endorsed:) Filed Jan'y 11, 1875. W'm H. Bradley, cl'k.

115 Afterwards, to wit, on the 5th day of March, A. D. 1875, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs.
HENRY H. WALKER ET AL. } In chancery.

On motion, leave is given the defendant Sherman A. Ricker to file a cross-bill herein.

On the same day, to wit, the 5th day of March, A. D. 1875, said defendant Sherman A. Ricker, by his solicitors, filed his cross-bill in said entitled cause; which said cross-bill is in the words and figures following, to wit:

Cross-bill of Sherman A. Ricker.

In circuit court of the United States, northern district of Illinois. In chancery.

NATHAN POWELL
vs.
HENRY H. WALKER, SAMUEL J. WALKER, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, W'm F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brannock, Branch, Julius Rosenthal, Emerson G.
116 Orvis, Mary E. Orvis, Elias Greenebaum, John Somes, William P. Frailing, William Flannagan, Flan'agan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, Northwestern Fertilizing Company, Third National Bank of S't Louis, James Q. Mitchell, John J. Squire. } Bill.

Cross bill of Sherman A. Ricker, one of the defendants in the above-entitled cause.

To the honorable the judges of the circuit court of the United States in and for the northern district of Illinois, in chancery sitting:

Your orator, Sherman A. Ricker, brings this his cross-bill in the above-entitled cause, and respectfully represents unto your honors that he is one of the defendants in the original bill of complaint filed in this cause. That the said original bill was brought to foreclose a mortgage on certain premises in said bill described. That said premises consist of blocks thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18) of Packer's subdivision of the northeast one-quarter of the southwest one-quarter of section five (5), township thirty-eight (38) north, of range fourteen (14) east of third (3d) principal meridian.

117 Your orator further represents unto your honors that on the fifth (5th) day of April, A. D. 1873, he purchased of Samuel J. Walker and Amanda M. Walker, his wife, block fourteen (14), one of the above described blocks. That the said Powell in his said bill of complaint includes said block fourteen (14) as covered by his said mortgage, and the co-defendants of your orator in said bill of complaint are seeking to charge said block fourteen (14) so purchased by him with the payment of the amount that may be found to be due on said mortgage. Your orator further says that before purchasing said block he caused the title to same to be examined by his lawyers, and was assured that the same appeared from the abstract to be free from encumbrance, which he now finds not to have been the fact.

Your orator further shows unto your honors that it is claimed by his co-defendants that the abstract of title to said premises shows that the said conveyance to your orator was the last, or among the very last, of the conveyances made by said Walker of any portion of said premises,

and must for that reason be first charged with the payment of said mortgage-debt. And your orator cannot deny that said abstract of title does substantially show such a state of the conveyances. But your orator thereupon shows unto your honors, and says that he is informed and believes, and on his belief states the fact to be, that since
118 the said purchase by him of said block fourteen (14), the said Samuel J. Walker made a contract (which has never been recorded) with one Louisa M. Tillinghast to sell to said Louisa M. Tillinghast one-half of block eighteen (18) of said Packer's subdivision, being parcel of said mortgaged premises, for a large sum of money, the exact amount of which your orator is unable to state, but believes to be in excess of eleven thousand dollars, and thereupon your orator says that after the making of said contract the said Louisa M. Tillinghast entered into possession of said premises and erected thereon a packing-house, so called, at an expense of upwards of eight thousand dollars.

Your orator further shows unto your honors that the contract-price agreed to be paid for said one-half of said block eighteen (18) has never been paid to said Samuel J. Walker, but is still in the hands of said Louisa M. Tillinghast, and should be charged with the payment of said mortgage-debt before your orator's said property can be charged therewith.

Your orator says further that he is informed and believes, and on his belief charges the fact to be, that at the time of the making of said contract last referred to the record title to said one-half of block eighteen (18) was in the said defendants W'm F. Coolbaugh and Heman G. Powers, but that the said Coolbaugh and the said Powers, at the said time
119 or subsequent thereto, agreed to convey and quitclaim all their interest in the same, at the request of said Walker, to the said Louisa M. Tillinghast; and your orator respectfully shows unto your honors that said half of said block eighteen (18) (a particular description of which he is at this time unable to give) is first liable for the payment of said mortgage-debt before the property of your orator can be charged therewith.

Your orator further shows unto your honors that he is informed and believes, and on his belief states the fact to be, that there is in the hands of Robert Hervey, Elliott Anthony, and A. T. Galt (constituting the firm of Hervey, Anthony & Galt), as attorneys of defendant W'm Flannigan, a large sum of money, proceeds of the sale of some portion of the said mortgaged property or promissory notes representing the same, which money or notes are claimed by said Samuel J. Walker, and which are also chargeable with and should be applied to the payment of the said mortgage-debt before the said property of your orator can be legally charged therewith; but your orator is unable to give the amount of money or promissory notes so in the hands of said Hervey, Anthony & Galt, or to give more particularly the facts relating thereto.

Your orator also shows unto your honors that Daniel L. Boone,
120 father of said Louisa M. Tillinghast, claims to have some interest in the premises, the nature of which your orator cannot fully state, and your orator says that the facts hereinbefore stated have only recently and after filing his answer herein come to his knowledge.

To the end therefore that equity be done, and that your orator may have that relief which he can only obtain in a court of equity, your orator prays that a writ of subpœna issue out of and under the seal of this honorable court, directed to the said Louisa M. Tillinghast, Robert Hervey, Elliott Anthony, A. T. Galt, and Daniel L. Boone, commanding them and each of them to be and appear before this honorable court,

at a certain time and under a certain penalty to be therein limited, full, true, and perfect answer to make to all and several the allegations in this cross-bill contained, but not upon oath (their oath and that of each of them being waived according to statute), and further to stand to, abide, and perform the decree of this honorable court herein. And that by the decree of this honorable court the said premises so sold to said Louisa M. Tillinghast, and the said money or promissory notes in the hands of said Hervey, Anthony & Galt, may be adjudged and decreed to be first liable for the payment of said mortgage-debt, or what may be
121 found to be due thereon, and that your orator's said property may be held not to be first liable for the same; and for such other and further relief as to the court may seem meet, and as in duty bound will ever pray.

SHERMAN A. RICKER,
By his solicitors, FULLER & SMITH.

FULLER & SMITH,
Counsel.

(Endorsed:) Filed March 5, 1875. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 18th day of March, A. D. 1875, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs.
HENRY H. WALKER ET AL. } In chancery.

On motion, leave is given Emerson G. Orvis to file a cross-bill herein, and the defendants therein are ruled to answer the same in five days.

On the same day, to wit, the 18th day of March, A. D. 1875, said defendant Emerson G. Orvis, by his solicitor, filed in said clerk's office his cross-bill in said-entitled cause; which said cross-bill is in the words and figures following, to wit:

122 *Cross-bill of Emerson G. Orvis.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL
vs.
S. J. WALKER, H. H. WALKER, E. G. ORVIS, John P. Squire, William Flannigan, William F. Coolbaugh, Heman G. Powers, Bacon Wheeler, the , and Louisa M. Tillinghast et al. } In chancery.

The cross-bill of Emerson G. Orvis, a respondent in the above-entitled cause.

To the honorable the judges of the said circuit court of the United States for the northern district of Illinois, in chancery sitting:

Humbly complaining, showeth unto your honors your orator, Emerson G. Orvis, who is a resident of said district, that the complainant in the above-entitled cause brought his bill of foreclosure in this court on, to wit, July 23d, A. D. 1874, against your orator and numerous others,

as defendants, seeking therein & thereby a sale of certain premises described therein under & by virtue of a mortgage upon the same executed by co-respondent, H. H. Walker, on, to wit, April 8th, A. D. 1869; that said bill alleges that the property upon which said mortgage is a lien, & which it is sought to sell to satisfy the same, is blocks
123 13, 14, 15, 16, 17, and 18 in Packer's subdivision of the northeast quarter of the southwest quarter of section five, township thirty-eight, range fourteen east, in Cook County, Illinois; that your orator is the owner in fee of the south hundred (100) feet of said block 16, being one-third thereof; that he acquired title thereto by warranty deed of said H. H. Walker dated February 26th, A. D. 1874, & which was duly recorded in the Cook County recorder's office, at Chicago, on April 9th, 1875, wherein said Walker sold said property to your orator free from any incumbrance whatever; that your orator duly filed his answer to said complainant's bill; that a reference herein was made to Henry W. Bishop, esquire, the master in chancery of this honorable court, who has heard testimony herein, and who is about to report to the court his findings in the premises.

And your orator would further represent that he is informed & believes, & upon such information & belief states, that it is sought by his co-defendant to charge his portion of said property with the first sale to be made under a decree sought herein by complainant, and that he is informed also that the said master in chancery has reported or is about to report to the court that he finds from the evidence, &c., that your orator's property should be first taken, or amongst the first,
124 on sale to satisfy complainant's mortgage; that on, to wit, March , A. D. 1875, co defendant Sherman A. Ricker filed his cross-bill herein, therein alleging certain new matter concerning transfers of title & sales of said mortgage-property subsequent to the sale to your orator, which, upon enquiry, your orator finds to be true; therefore your orator, with leave of court first had and obtained, exhibits this his cross-bill, and alleges that he is informed and believes that said co-defendants, Samuel J. and Henry H. Walker, did, on or about , sell to one Daniel W. Tillinghast, since deceased, the south half of block eighteen of said mortgaged premises, and that said Tillinghast thereupon took possession thereof & erected thereon certain improvements; that said Tillinghast died without obtaining any conveyance of and for said property; that since his decease his widow, Louisa M. Tillinghast, has occupied and controlled said property, although having no recorded title to the same; that she has recently procured a contract of sale of and for the same from said Samuel J. Walker, William F. Coolbaugh, and Heman G. Powers, which contract does not apppear of record; and your orator would further represent that on, to wit, July first, A. D. 1872, said Samuel J. Walker conveyed said block eighteen, with other property, to said William F. Coolbaugh and Heman G. Powers, which
125 conveyance appears of record uncancelled; that said Tillinghast, notwithstanding said recorded title to the whole of said block eighteen in said Coolbaugh and Powers, entered into and have ever since had & kept possession of the south half thereof, and that in and by said contract herein referred to (as your orator is informed and believes), which is in the hand either of the said Coolbaugh and Powers or M'r's Louisa M. Tillinghast, the said Coolbaugh and Powers covenant and agree to convey the said south half of said block eighteen at any time to said Louisa M. Tillinghast, which conveyance, when made and recorded, will be the last recorded conveyance of said mortgaged property of record, and therefore in equity the first property to be sold under any de-

cree of foreclosure procured by complainant herein; and that your orator and his co-defendants are in justice & equity entitled to have the said deed of conveyance from said Coolbaugh & Powers to said M'r's Louisa M. Tillinghast executed and recorded, so as to publicly complete the record of the transfers of the mortgaged property and make said property amenable to the decree of this court to be made herein, as in justice & truth it ought to be & as your orator is informed & believe' he and his co-defendants are entitled to the recording of such deed of and for said south half of said block eighteen to exhibit the true
126 record of the transfers of said property, without which your orator's, this co-defendant's property, is liable to sale as the last mortgaged property alienated on the record, which in truth it is not.

That your orator had no intimation or knowledge of the facts above alleged until after he had filed his answer herein and had completed his proofs, and that he has only acquired knowledge of the existence of said contract between Coolbaugh, Powers, Walker, and M'r's Tillinghast from the evidence produced by his co-defendant, Sherman A. Ricker, under his cross-bill recently filed herein.

And your orator would therefore pray that the writ of subpœna may issue out & under the seal of this honorable court, directed to the said William F. Coolbaugh, Heman G. Powers, and Louisa M. Tillinghast, commanding them and each of them, at a time & under a penalty therein limited, to be & appear before this honorable court, and then and there full, true, direct, & perfect answer make to this cross-bill, as fully & particularly as though specially interrogated thereunto, and then and there actual & full discovery make of all the matters & things concerning the sale & title of said Louisa M. Tillinghast of & to the said south half of said block eighteen of said mortgaged premises, and that on a hearing hereof it may be ordered that the said Coolbaugh,
127 Powers, & Walker (or all persons who under said contract when produced in court shall appear to have contracted to execute title to said Louisa M. Tillinghast of said property) execute forthwith the proper conveyance, provided by said contract of & for said property, to said Louisa M. Tillinghast, and that the same be ordered filed for record with the recorder of deeds of & for said Cook County, Illinois; and that your orator and his co-defendant have such other & further relief concerning the matters herein alleged as to your honor shall seem fitting & meet; and that it may please your honor to grant a stay of proceedings in this cause until the defendant to this cross-bill answer & proofs are taken hereunder, and that the master in chancery may be directed to withhold his report (if not already filed) until the facts alleged herein are enquired into; and that your orator may have such other & further relief in the premises as to your honor shall seem meet, &c.

And, as in duty bound, your orator will ever pray, &c.

EMERSON G. ORVIS,
By HUGH ALEXANDER, J'R,
His Solicitor.

HUGH ALEXANDER, J'r.
Compl't's Sol'r in Cross-bill.

I consent to the filing of this cross-bill.

J. MULVEY,
Sol'r for N. Powell, Compl't.

128 (Endorsed:) Filed March 18, 1875. W'm H. Bradley, cl'k.

Afterwards, on the 24th day of March, A. D. 1875, said parties, by their solicitors, filed in said clerk's office their stipulation in said-entitled

cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

In circuit court of the U. States, northern district of Illinois.

NATHAN POWELL
vs.
HENRY H. WALKER ET AL. } Bill.

NATHAN POWELL ET AL.
ads.
E. G. ORVIS. } Cross-bill.

It is hereby stipulated and agreed that the answers of W'm F. Coolbaugh and Heman G. Powers to the original bill of complaint herein, together with the cross-bill of Sherman A. Ricker, shall stand for and be regarded as the answer of said Coolbaugh, Powers, & Ricker to the cross-bill of said E. G. Orvis filed herein; and the testimony taken under the cross-bill of Sherman A. Ricker shall be regarded & consid-
129 ered the same as if taken also in the cross-bill of said Orvis.

HUGH ALEXANDER, J'R,
Sol'r for E. G. Orvis et al.
FULLER & SMITH,
Sol'rs for Coolbaugh, Powers, & Ricker.

(Endorsed:) Filed March 24, 1875. W'm H. Bradley, cl'k.

130 Afterwards, to wit, on the 27th day of March, A. D. 1875. said Henry W. Bishop, esq., master in chancery, to whom said cause was referred, filed in said clerk's office his report in said entitled cause, which said report is in the words and figures following, to wit:

Master's report.

In the circuit court of the United States for the northern district of Illinois. In chancery.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, SAMUEL J. WALKER, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brannock, Brannock, Julius Rosenthal, Emerson G. Orvis, Elias Greenbaum, Mary E. Orvis, John Somes, William P. Frailey, William Flanagan, Flanagan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bondi, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third National Bank of Saint Louis, James Q. Minschall, and John P. Squire, defendants. } Original bill.

131 And cross-bill of Sherman A. Ricker, one of the defendants in the above-entitled cause.

Master's report.

To the honorable the judges of said court:

The above cause having been referred to me as master in chancery of said court, by an order of said court, dated the fifth (5th) day of November, in the year of our Lord one thousand eight hundred and seventy-four (A. D. 1874), to take proofs and report the same to the court, under the original bill herein, and by an order of said court to take proofs and report the same to the court under the said cross-bill herein, I do hereby report that, having given notice to the parties interested that a hearing therein, for the purposes in said order expressed, would be had before me, at my office, number 25 Republic Life Building, La Salle street, Chicago, on Monday, the sixteenth (16th) day of November, then instant (being in the year 1874), at two (2) o'clock p. m., I was attended on said day by Junius Mulvey, esquire, solicitor for the complainant in the original bill, who produced in evidence before me all the papers filed in said cause, including the bill of complaint in the original bill herein, together with the promissory note and mortgage mentioned and set forth in the said original bill.

I further report that, from an examination of the said promissory note and mortgage, and from a computation of the amount due thereon, I find that there is due and owing from said defendants, Henry
132 H. Walker and Samuel J. Walker, to the said complainant in the original bill, the sum of twelve thousand dollars ($12,000), for the principal, and the sum of twenty-eight hundred and fifty-three dollars and thirty-three cents ($2,853.33) for interest thereon, to the date of this report, making a total sum due and owing from said defendants, Henry H. Walker and Samuel J. Walker, to said complainant in the original bill, on the said promissory note and mortgage, of fourteen thousand eight hundred and fifty-three dollars and thirty-three cents ($14,853.33), for principal and interest to the date of this report.

I further report that I was attended on Thursday, the nineteenth (19th) day of November, A. D. one thousand eight hundred and seventy four (1874), by the said Junius Mulvey, and also by A. M. Pence, esquire, of the firm of Rosenthal & Pence, of counsel for defendants, Elias Greenbaum, The International Bank, Francis A. Hoffman, Gerhard Foreman, Levi Abt, John Brannock, Patrick Brannock, and Julius Rosenthal.

The said A. M. Pence testified as a witness on behalf of said defendants, Elias Greenbaum and Gerhard Foreman. His said testimony was duly taken, is hereto attached, and forms a part hereof.

I was also attended on said last-mentioned day by Berthold Loewenthal, a witness on behalf of the International Bank of Chicago, whose testimony was duly taken, is hereto attached, and forms a part hereof.

The hearing of further testimony herein was then adjourned to
133 Saturday, the twenty-first (21st) day of November, A. D. 1874 (eighteen hundred and seventy-four), on which day I was attended by Joseph E. Smith, esquire, of the firm of Fuller & Smith, of counsel for defendants, William F. Coolbaugh, Addie B. Coolbaugh, Heman G. Powers, and Sarah E. Powers, and Sherman E. Ricker.

The said Joseph E. Smith testified as a witness on behalf of defendants, William F. Coolbaugh and Heman G. Powers. His said testimony was duly taken, is hereto attached, and made a part hereof.

I was also attended on said last-mentioned day by David Quigg, esquire, of the firm of Bentley & Quigg, of counsel for defendants, The

Northwestern Fertilizing Company and Abner Taylor. I was also attended on said last-mentioned day by the said defendant, Henry H. Walker, who testified as a witness on behalf of said Northwestern Fertilizing Company. The testimony of the said Henry H. Walker was duly taken, is hereto attached, and forms a part hereof.

I was also attended on said last-mentioned day by Robert W. Ralston, a witness on behalf of the said Northwestern Fertilizing Company, whose testimony was duly taken, is hereto attached, and forms a part hereof.

There was produced in evidence before me an abstract title to the property mentioned in the mortgage to said complainant in the original bill as set out and described in the original bill herein; and the several solicitors appearing for the defendants herein, stipulated that the said abstract of title so offered in evidence as last aforesaid, truly rep-
134 resents the record of the different instruments thereby shown, so far as purports the dates of filing the same, and that the same might be used as evidence in lieu of original documents, subject, however, to contradiction by any competent evidence.

The taking of further testimony herein was then adjourned to Tuesday, the twenty-fourth (24) day of November, A. D. 1874 (eighteen hundred and seventy-four), on which day I was attended by Hugh Alexander, junior, esquire, of counsel for defendants, Emerson G. Orvis, Mary E. Orvis, John P. Squire, Elias Greenbaum, John Somes, and William P. Frailey. The testimony of the said Hugh Alexander, junior, was duly taken, is hereto attached, and made a part hereof.

I was also attended on said last-named day by said defendant, Samuel J. Walker, whose testimony was duly taken, is hereto attached, and made a part hereof. I was also attended on said last-mentioned day by said defendant, Elias Greenbaum, whose testimony was duly taken, is hereto attached, and made a part hereof. I was also attended on said last-mentioned day by said A. M. Pence, esquire, who testified on behalf of said defendant, Patrick Brannock. His testimony was duly taken, is hereto attached, and made a part hereof. I was also attended on said last-mentioned day by William C. Grant, esquire (of the firm of Grant & Swift), of counsel for C. S. Symonds and Daniel Pratt, assignees in bankruptcy of the People's Safe Deposit and Savings Institution of the State of New York. The documents produced in
135 evidence before me by said William C. Grant (being the answer of said C. S. Symonds and Daniel Pratt to said original bill of complaint herein; a promissory note from said defendant, Henry E. Picket, to said defendant, Samuel J. Walker; a deed of trust securing said last-mentioned promissory note; another promissory note from said defendant, Henry E. Picket, to said defendant, Samuel J. Walker; another deed of trust, being a deed of trust for securing the payment of said last-mentioned promissory note; a certified copy of the appointment of said Daniel Pratt & C. S. Symonds as assignees of the said People's Safe Deposit & Savings Institution; and a certified assignment of the estate of said People's Safe Deposit and Savings Institution) are hereto annexed and made a part hereof, being marked respectively, Exhibits F, G, H, I, J, K, and L.

I further report that I was attended on Saturday, the sixth (6th) day of March, A. D. 1875 (eighteen hundred and seventy-five), by the said Joseph E. Smith, esquire, of the firm of Fuller & Smith, of counsel for the said Sherman A. Ricker, under the said cross-bill filed by the said Sherman A. Ricker, and also by Robert Hervey, a witness on behalf of the

said Sherman A. Ricker, whose testimony was duly taken, is hereto attached, and made a part hereof.

I was also attended on said last-named day by Daniel L. Boone, and other witness on behalf of the said Sherman A. Ricker, under the said cross-bill. The testimony of the said Daniel L. Boone was duly taken, is hereto attached, and made a part hereof.

136 I further report that from an examination of the abstract of title, so produced as aforesaid, I find that on the thirtieth (30th) day of September, 1870 (eighteen hundred & seventy), there was recorded in the recorder's office of Cook County, Illinois, in book 172 of maps, page 25, a plat of a subdivision of the property included in the mortgage to the said complainant in the original bill, which plat was entitled "Packer's subdivision of the N. E. ¼ of the S. W. ¼ of sec. 5, T. 38, R. 14."

And I further report that from an examination of the said abstract of title so produced as aforesaid, and from the testimony of the several witnesses who have appeared before me herein, I find that the equities of the said defendants in the original bill herein are such that the property included in the said mortgage to complainant in the said original bill, which still remains as a security thereunder and which has not been released, should be offered for sale in the following manner, to wit:

First. The north two hundred and one (201) feet of block sixteen (16) of Packer's subdivision of the northeast quarter of the southwest quarter of section five (5), township thirty-eight (38) north, range fourteen east, of the third principal meridian; and if the amount realized on said sale shall be insufficient to pay and satisfy the total amount due and owing to said complainant in the original bill, then should be offered for sale,

Second. The south one hundred (100) feet of the said block sixteen (16); and if the amount realized on said sale shall be insufficient to

137 pay and satisfy the total amount due and owing to the said complainant in the original bill then should be offered for sale.

Third. Block fourteen (14) of the said Packer's subdivision; and if the amount realized on said sale shall be insufficient to pay and satisfy the total amount due and owing to said complainant in the original bill, then should be offered for sale,

Fourth. Blocks thirteen (13) and eighteen (18) of the said Packer's subdivision; and if the amount realized on said sale shall be insufficient to pay and satisfy the total amount due and owing to the said complainant in the original bill, then should be offered for sale,

Fifth. Block fifteen (15) of the said Packer's subdivision; and if the amount realized on said sale shall be insufficient to pay and satisfy the total amount due and owing to the said complainant in the original bill, then should be offered for sale block seventeen (17) in said Packer's subdivision.

The cross-bill of Sherman A. Ricker, aforesaid, having also been referred to me to take proofs and report the same, I do hereby report that it appears from the testimony hereto attached, taken thereunder, that there was a contract for sale to Louisa M. Tillinghast of the south half of block eighteen (18), which said contract was dated the third (3d) September, 1874 (the same not appearing of record), for the sum of eleven thousand five hundred and ninety-three dollars & forty-one cents ($11,593 41/100), and that it would appear (if the same had been duly recorded) that the said premises were first liable to be sold for the payment of said mortgage indebtedness to the complainant in said original

138 bill.

I also report that there is in the hands of Robert Hervey, es-

quire, certain securities, proceeds of a sale of a portion of the premises covered by said mortgage held in escrow by said Robert Hervey and not to be delivered till the said portion, to wit, block sixteen (16) in the said Packer's subdivision, be freed from all incumbrance; and it would also appear from the said testimony that said Walker's interest in said securities should also be sold and the proceeds applied to the extinguishment of the said mortgage indebtedness before resort be had to the sale of any portion of the premises covered by the said mortgage.

The whole of which is respectfully submitted.

Dated Chicago, March 17th, 1875.

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, SAMUEL J. WALKER, and others, defendants. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Thursday, November 19th, 1874.

Present, M'r Pence, of counsel for the defendant, and Junius Mulvey, of counsel for complainant.

139 *Testimony of Berthold Loewenthal.*

BERTHOLD LOEWENTHAL, a witness on behalf of the International Bank, being first duly sworn, was examined in chief by M'r Pence, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. Berthold Loewenthal; of full age; Chicago; president of International Bank.

The bank holds a note executed by Henry H. Walker, dated September 26th, 1870, being for the sum of $10,000, and due 2 years after date, a copy of which is here offered, and is marked as "Exhibit A." To secure that note a trust-deed was executed by Samuel J. Walker and wife, bearing even date with that note, and running to Francis A. Hoffman as trustee, and conveying blocks fourteen (14) and fifteen (15), in Packer's subdivision, in controversy in this case. That trust-deed also secured another note for ten thousand dollars, executed by Henry H. Walker. That note has since been paid, being then in our possession, and at the same time the bank caused the trustee to release said block 14. The said trust-deed is here offered in evidence, and is marked as "Exhibit B." The note still held by us, as above described, is now due with interest thereon to this day, amounting in the whole to $13,317.77. The trust-deed referred to was filed for record in the recorder's office of Cook County, Illinois, on the 29th day of September, 1870, no payments have ever been made on account of this note.

140 The bank has in its possession another note for $8,750, bearing date September 10th, 1870, executed by Brian Philpot, falling due 2 years after date, a copy of which is here offered in evidence and

marked as "Exhibit C." To secure payment of same, Brian Philpot executed a trust-deed, bearing even date with said note, and running to John G. Rogers as trustee, which convey' lot or block thirteen (13) in said Packer's subdivision; said note belongs to Levi Abt, and is left with the bank for collection. No part of the note has been paid, either principal or interest, and the amount due to-day on said note is $11,684.17. The trust-deed is here offered in evidence, and was filed for record in the recorder's office of Cook County, Illinois, on the third (3rd) day of October, 1870, and is marked as "Exhibit D."

BERTHOLD LOWENTHAL.

MEMO.—The trust deeds aforesaid are in the possession of M'r Loewenthal.

Subscribed and sworn to before me this 19th November, 1874.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, SAMUEL J. WALKER, AND others, defendants. } In chancery.

141 Testimony taken before Henry W. Bishop, master in chancery of said court, Thursday, November 19th, 1874.

Present, Junius Mulvey, of counsel for complainant, and A. M. Pence, of counsel for defendants.

Testimony of A. M. Pence.

Said A. M. PENCE, a witness on behalf of the defendants, being first duly sworn, deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. A. M. Pence; of full age; Chicago; attorney at law.

I have in my possession 1 note of $12,000, executed by J. D. Kinney, & dated Nov. 25th, 1872, and due on or before 3 years after date, which note is secured by a trust-deed of even date, executed by John D. Kinney, and running to John G. Rogers, trustee, which conveys block sixteen, in said Packer's subdivision. Said trust deed was filed for record in the recorder's office of Cook County, Illinois, on the 23rd of October, 1873. A copy of the note is offered in evidence, and marked as "Exhibit E." The south 100 feet of said block 16 was afterwards released. Said note is the property of Greenbaum & Foreman, two of the defendants herein. At the time of the aforesaid release, Emerson G. Orvis, namely, on the 26th Feb'ry, 1874, executed his note for $4,000, due 1 year after date, & to secure same executed trust-deed to Elias Greenbaum, & thereby conveyed to him said south 100 feet in block 16. Said trust-deed was filed for record in the recorder's office of Cook County, Illinois, on April 9th, 1874. The Orvis note is now held and
142 owned by said defendants Greenbaum & Foreman. I have the notes last described, and which are owned by Greenbaum & Foreman.

A. M. PENCE.

Subscribed and sworn to before me this 19th November, 1874.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, SAMUEL J. WALKER, and others, defendant'. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Saturday, November 21st, 1874.

Present, Joseph E. Smith, of counsel for defendants, W. F. Coolbaugh, H. G. Powers, and S. A. Ricker.

Testimony of Joseph E. Smith.

JOSEPH E. SMITH, a witness on behalf of the defendants aforesaid, being first duly sworn, deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. J. E. Smith; of full age; Chicago; attorney at law.

I produce in evidence in this case a warranty deed dated July 1st, 1872, from Samuel J. Walker and wife to William F. Coolbaugh
143 & Heman G. Powers, conveying blocks numbers 7, 12, 13, 14, 16, 18, and the south 181 $\frac{25}{100}$ ths feet of block 8 in Packer's subdivision of the northeast quarter of the southwest quarter of section No. 5, township 38 N., R. 14 east of third P. M., and recorded in the recorder's office of Cook County in volume 202 of records, page 102, on the 7th December, 1872. I believe that since the date of this deed Mess'rs Coolbaugh & Powers have conveyed blocks 16 and 14, and the blocks 13 and 18 are all that are covered by the mortgage herein.

JOSEPH E. SMITH.

MEMO.—M'r Smith retains the above deed.

Subscribed and sworn to before me this 21st of November, 1874.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER, SAMUEL J. WALKER, and others, defendant'. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Saturday, November 21st, 1874.

Present, M'r Quigg, of counsel for the Northwestern Fertilizing Company.

Testimony of Henry H. Walker.

HENRY H. WALKER, a witness on behalf of the said company,
144 being first duly sworn, was examined in chief by M'r Quigg, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. Henry H. Walker; of full age; Chicago; real-estate dealer.

I am acquainted with Samuel J. Walker and Amanda M. Walker, his wife, and with the handwriting of each of them, and know the signatures to the deed dated 2nd October, 1871, from S. J. Walker & Amanda, his wife, to Robert W. Ralston, and particularly described in said R. W. Ralston's deposition in this cause, to be the genuine signatures of said S. J. Walker and Amanda M. Walker.

H. H. WALKER.

Subscribed and sworn to before me this November 21st, 1874.

H. W. BISHOP,
Master in Chancery of the U. States Circuit Court for the Northern District of Illinois.

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER & OTHERS, DEFENDANT. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Saturday, November 21st, 1874.

Present, M'r Quigg, of counsel for the Northwestern Fertilizing Company.

145 *Testimony of Robert W. Ralston.*

ROBERT W. RALSTON, a witness on behalf of the said company, being first duly sworn, was examined in chief by M'r Quigg, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. R. W. Ralston; of full age; Chicago; vice-president of the Northwestern Fertilizing Company.

On the 2d of Oct'r, 1871, I purchased from Samuel J. Walker a block numbered 17 in Packer's subdivision of the northeast ¼ of the southwest ¼ of section 5, township 38 N., range 14 east of 3rd P. M., Cook County, Illinois, and received from said S. J. Walker a warranty deed dated Oct'r 2, 1871, conveying the above premises, which deed was signed by S. J. Walker, & Amanda Walker, his wife, & purports to be acknowledged on the 18th of Oct'r, 1872, but the deed, with the certificate of acknowledgment thereto attached, was filed for record in the recorder's office of Cook County, on the 4th of Sept'r, 1872, & was recorded in volume 130 of records, on page 316. The deed was actually acknowledged & the certificate thereof was signed by the notary before the said deed was filed for record.

(The above deed is offered in evidence, but is retained for safe keeping by said M'r Quigg.)

Although the foregoing deed was executed to me as aforesaid, the

purchase of said property was made for said Fertilizing Company; & by deed dated October 3rd, 1871, filed for record in the recorder's office of Cook County, on September 4th, 1872, in book 43 of records, page 40, I conveyed said premises to the Northwestern Fertilizing Company, which is now the owner of the same.

146 ROBT W. RALSTON.

This deed is offered in evidence & retained for safe keeping by M'r Quigg.

Subscribed and sworn to before me this 21st November, 1874.

H. W. BISHOP,
Master in Chancery of the U. States Circuit Court for the Northern District of Illinois.

EXHIBIT A.

$10,000.] CHICAGO, *September* 26, 1870.

Two years after date I promise to pay to the order of Samuel J. Walker, ten thousand dollars at the Second National Bank, Chicago, Illinois, value received, with interest from date at eight per cent. per annum, payable annually.

(Signed) HENRY H. WALKER.

(Across the face:) Secured by block 15, Packer's add'n.

(Endorsed:) Sam'l J. Walker.

EXHIBIT C.

$8,750.] CHICAGO, *September* 10, 1870.

Two years after date I promise to pay to the order of Samuel J. Walker, eighty-seven hundred and fifty dollars, at the Second National Bank, Chicago, Illinois, value received, with interest at 8 per cent. per annum, payable annually.

(Signed) BRIAN PHILPOT.

(Endorsed:) Sam'l J. Walker.

147 It is hereby stipulated by Bentley & Quigg, sol'rs for Northwestern Fertilizing Company and for Abner Taylor, by J. E. Smith, sol'r for W. F. Coolbaugh, H. G. Powers, and S. A. Ricker, by H. Alexander, jr., sol'r for E. G. Orvis, J. P. Squires, J. Somes, & W. P. Frailey, by A. M. Pence, sol'r for Elias Greenbaum, Gerhard Foreman, F. B. Hoffman, The International Bank, and Levi Abt, by Junius Mulvey, solicitor for complainant, by C. T. Adams, solicitor for S. J. Walker & H. H. Walker, that the abstract now offered in evidence truly represents the record of the different instruments thereby shown, so far as purports the dates of filing the same, and that the same may be used as evidence in lieu of original documents, subject, however, to contradiction by any competent evidence.

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER ET AL., DEFENDANT'. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery, of said court, on the 24th day of November, A. D. 1874, at 2 p. m.

Present, M'r Mulvey, of counsel for complainant, and Messrs. Pence, Quigg, and Alexander, of counsel for defendants.

Testimony of Samuel J. Walker.

SAMUEL J. WALKER, a witness on behalf of the defendants, being first duly sworn, was examined in chief by M'r Pence, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

148 Ans. Samuel J. Walker.

Q. I want to ask you in reference to the Bacon Wheeler mortgage, given upon block 16 in Packer's subdivision of the premises in question. Please state what you know about that. I see it is not released of record.

A. That is paid; was paid at maturity, or the day after.

Q. When was that?

A. That was just before the fire. I think it was about October 5th.

Q. Do you know why it was not released?

A. Yes, sir. I was under the impression at the time it was on block 17, and I had sold block 17, and supposed this mortgage was on that, and afterwards learned it was on 16, and then I tried to make the exchange; having sold block 17, and desiring to make the title good, I tried to make a change, consequently let the matter stand and never called for a deed.

Q. Does Bacon Wheeler now refuse to execute a release to block 16? I have understood he refused to execute a lease of 16 for the reason that he did not know which one the trust-deed was on.

A. Yes, sir; he has objected since the fire to making a release of the property, not being certain, or something of that sort.

Q. Was this released or paid, the indebtedness secured by the trust-deed on block 16; was it paid about the time that Greenbaum and Foreman purchased or took the Kinney trust-deed?

A. No; long before.

Q. Through whom was it paid, through what bank?

149 A. The Prairie State Bank.

Q. By whom was the note held?

A. It was held by some eastern bank.

Q. What was done when the note was paid?

A. The note was taken up, and if it is not in my possession it may have been burned at the time of the fire; most of my papers were burned more or less.

Q. Is either burned or destroyed?

A. Yes, sir; I say if it is not in my possession it may have been burned.

Cross-examination by M'r Quigg:

Q. When did you sell block 17?

A. I don't remember the exact date. I can tell by reference to the abstract probably.

Q. Was it about the date of the deed? The date of the deed was the end of October; was it before the fire?

A. Yes, sir; I don't recollect the date exactly. I think it was before the fire. I know it was about the time of the payment of this thing.

Q. I will ask you whether there was any incumbrance on block 17, and if there was another trust-deed to Bacon Wheeler?

A. There was.

Q. Now, I will ask you which indebtedness you intended to pay, whether upon block 16 or upon block 17?

A. I intended and thought I was paying on block 17.

Q. You intended the money to be appropriated for the payment of the indebtedness on block 17?

150 A. Yes, sir.

Q. Was anything said by you at the time this money was paid?

A. I don't recollect. I think the note was first taken up, probably at the time.

Q. I will ask you in regard to these notes, how many notes were there outstanding of the same date and the same amount?

A. Three of $7,500 each on 16, 17, and 18.

Q. Each secured by a deed of trust to Bacon Wheeler?

A. Whether they were separate deeds or one deed of trust I do not now recollect.

Q. There were separate deeds of trust on each block. What was your object in paying on block 17?

A. I had sold it, and wanted to give M'r——

Q. And you proposed to pay that up?

A. Yes, sir; and thought I was paying that up.

Q. I will ask you if you made any effort afterwards to have the money appropriated or to procure a release of block 17?

A. I did to make the change. I wanted to substitute one for the other.

Q. That is you wanted the money applied where you intended it should go in the first place?

A. Yes, sir; I had not sold block 16, and of course, selling 17, I wanted to clear it up, and had I not supposed that this note was on block 17 I certainly should have paid the note that was on that, and left that out instead of block 16.

151 Redirect examination by M'r Pence:

Q. I understand you that, as a matter of fact, you paid on 16?

A. I paid a note secured on 16, but supposed at the time I was paying it on 17.

Q. You so informed Greenbaum and Foreman it was paid on 16, at the time you took the Kinney trust-deed.

A. That was long afterwards, when I found I could not make the change. The payment was really on 16; that is the note paid was secured on 16.

Recross-examination by M'r Quigg:

Q. Do you remember who the maker of that note was?

A. I think it was M'r Pickett.

Q. Henry E. Pickett?

A. Yes, sir.

Cross-examination by M'r Alexander:

Q. You made a sale to William Fleming, did you not, of some property in Packer's subdivision?

A. Yes, sir.

Q. What proportion and what blocks?

A. I think it was the north two hundred feet of block 16.

Q. What was the consideration of the franchise money?

A. I am not certain whether it was fifteeen or sixteen thousand dollars; thereabouts.

Q. Any part of it paid down?

152 A. Yes, sir.

Q. Is there any part of that purchase-money, either in cash or in notes, still in Fleming's hands due you?

A. In his attorney's hands?

Q. Hervey, Anthony & Gault?

A. Yes, sir; M'r Hervey.

Q. What amount, either in notes or money? And specify the amount of each, if both.

A. I don't recollect the exact amount. The notes, I think, are in the neighborhood of nine thousand dollars.

Q. Is there any cash?

A. I don't recollect just now whether there is or not. There is a certain amount of paper left there for the purpose of being used in perfecting the title, clearing it up.

Q. What particular defects was the paper held by Fleming's attorneys to cure?

A. Until the balance of the Barrell mortgage was off, and I think part of the Kinney note.

Q. Do you know how those notes were drawn? To whose order and for what time?

A. I think they were drawn to Henry H. Walker. I think they went through him to M'r Fleming.

Q. Due about when?

A. Well, I have forgotten exactly; probably one and two years.

Q. I see your deed to Fleming is of record?

A. Yes, sir.

Q. Were these securities in the hands of Hervey, Anthony & Gault deposited there as an escrow?

153 A. Yes, sir; left there for the purpose of perfecting the title; that is, the removal of these incumbrances.

Q. What blocks compose the south half of the Packer subdivision which is still subject to this Powell mortgage?

A. 16, 17, and 18, and 10, 11, 12, and 13.

Q. Refresh your recollection from that plat.

(Plat shown to witness.)

A. 13, 14, 15, 16, 17, and 18.

Q. Now, will you state what portion of any of those blocks remain unsold, and the title other in Henry H. Walker or yourself?

A. There is not any title to either of them in myself or brother.

Q. Neither in you or Henry H.?

A. No, sir. M'r Coolbaugh holds the title, I think.

Q. What portion of those blocks still subject to the Powell lien are held by any person other than Henry H. or Samuel J. Walker in trust for or for the benefit of either of the Walkers?

A. I suppose you consider the property held by M'r Coolbaugh in trust for myself. I did make a sale of this property at one time, the

property named there, to M'r Coolbaugh and Powers, and afterwards cancelled the sale, or agreed to take it back and let them hold the title for the money advanced by them, if any money was due to them, if there was anything due M'r Coolbaugh or the bank.

Q. At the present time is there anything due M'r Coolbaugh for which he should hold that as a security?

A. Yes, sir.

154 Q. About how much?

A. I don't recollect the amount.

Q. Give an approximate amount.

A. Well, it would be more than enough to cover any margin in them over and above the incumbrances on them. The conveyance of Coolbaugh and Powers was recorded after the conveyance of 16 and 17.

Q. Then there is none of these six blocks held by Henry H. or Samuel J. Walker?

A. No, sir.

Recross-examination by M'r Quigg:

Q. I will ask you about these Pickett trust-deeds, were those bona fide incumbrances?

A. Yes, sir; sold outright.

Q. None of those have ever been paid except lot 16 or 17?

A. I don't know but there has; I am not certain about that. There is some I intended to pay. I don't know exactly.

Q. How much did you pay?

A. I paid him some considerable amount of money in taking up incumbrances, and any surplus I intended to apply on this.

Q. How much have you paid on this indebtedness on these blocks 16, 17, and 18?

A. I have only paid off entirely one.

Q. You say you have applied surplus from time to time from other transactions on this indebtedness; how much have you paid?

A. That was small; I don't know exactly.

155 Q. Have you paid any amount which would apply on blocks 16, 17, or 18?

A. I intended, if there was any surplus out of certain things, to have it apply on 17.

Q. I am asking whether there has been any surplus.

A. I cannot say; I have not had the amount made up.

Q. You don't know how it stands?

A. I don't know exactly how it stands.

Q. Have you paid any moneys to M'r Grant out of which would arise a surplus to be applied somewhere?

A. I have made him some payments out of which I supposed there was some surplus which I intended would go to this.

Q. Which?

A. Block 17.

Q. But you don't know whether there is as a matter of fact?

A. No, sir.

Q. Have you had any settlement with M'r Grant in any way to determine what is due?

A. No, I have not had a full settlement with M'r Grant; I have been intending to pay him some more money on this.

Q. Have you had any talks with M'r Grant recently about this incumbrance?

A. Well, simply that I said to M'r Grant recently, that I expected to

pay him some money soon on some of these incumbrances, intending it, of course, to be on block 17.

Q. He has blocks 17 and 18?

A. Yes, sir.

156 By Mr. Pence:

Does he have the notes secured on 17 and 18?

A. I understand so.

Q. Was he represented the owner of the indebtedness or the owner of the incumbrance on block 16 at the time it was paid?

A. No, sir.

Q. He had nothing to do with that?

A. He has nothing to do with that; that was paid to the bank that held it, I think, before it went into liquidation.

Q. How did it happen that you paid a note for $7,500, secured by a deed of trust, and did not take any release?

A. Well, it is customary to pay and then apply to the trustee for a release.

Q. Isn't it customary here where paper is sent on for collection to deposit the release and the note in the bank?

A. Often done; yes, sir; but the trustee being here, we often pay and go to the trustee afterwards.

Q. Did you make any application to the trustee to release either block 16 or 17 immediately after the payment of this note?

A. I did not immediately. I discovered my mistake and tried to make the exchange.

Q. Did you apply to the trustee to release block 17 immediately after the payment of this note?

A. Of course not; because the note I had taken up was on block 16. Of course I could not apply to him.

157 Q. I will ask you if you made any statements to Rawson about the time of the purchase of this block in regard to an incumbrance on block 17?

A. I told M'r Rawson about this incumbrance, and I either told him that I had paid or had provided for the payment to be made of this $7,500.

Q. Didn't you tell Rawson that you had paid it, or, rather, didn't you tell Rawson that there were no incumbrances on this property?

A. No; this thing was spoken of: I told him it was either provided for or had been paid, and was paid about that time.

Q. Are you certain anything was said about any incumbrances on block 17?

A. I think Rawson and I talked about the $7,500.

Q. Have you any recollection whether anything was said in regard to incumbrances on block 17 at the time of the purchase by Rawson, and wasn't it represented that there were no incumbrances upon it?

A. I represented to M'r Rawson, I was under the impression—I intended to pay that block 17 instead of 16, and supposed I had done it.

Q. Then, if you made any statements in regard to it, it was on the supposition that the money had been applied to the payment of the indebtedness on block 17?

A. I did afterwards tell him the incumbrance was off. I was under the impression it had been paid. I was under the impression when this was paid that it was on 17 and 16, and therefore never have taken a release.

158 Recross-examination by M'r Alexander:

Q. Do you remember the contract of Henry H. and Samuel J. Walker with Rawson Orvis for the south one hundred feet of 16?

A. Yes, sir.

Q. Do you know whether or not you stated to him through his attorney that the Bacon Wheeler trust-deed on 16 was paid?

A. Yes, sir.

Q. And whether you stated to him or his attorney that if they demanded, probably M'r Wheeler would release them, or what instructions you gave either of them about seeing Bacon Wheeler about releasing?

A. I stated it had been paid, and I think at that time I went for a release myself—about that time.

Q. Have you seen the remaining two notes for $7,500 each that M'r Grant has? Have you seen them lately?

A. No, sir.

Redirect examination by M'r Pence:

Q. Were all three of the notes in the bank you refer to, the Prairie State Savings, Loan, and Trust Company?

A. I think not. I think one was sent out, and interest paid on the others.

Q. And that was the note secured on block 16, as it turned out to be?

A. It turned out to be block 16.

159 Q. That was the only note that was there at the time?

A. That is my recollection.

Q. Did the three notes which were secured upon blocks 16, 17, and 18 respectively, by trust-deed, fall due at the same time or different times?

A. Different times.

Q. And the notes secured by block 16 fell due first, according to your recollection?

A. That is my recollection.

Q. The trust-deeds were given in 1870, and a year afterwards, in October, 1871, the note secured by block 16 was paid?

A. Yes, sir; a day or two afterwards, probably; I think it was on the 4th or 5th.

Recross-examination by M'r Alexander:

Q. Was it due when paid?

A. Yes, sir.

Q. The other two are not due?

A. No, sir.

Q. Are you acquainted with Lucy M. Tillinghast?

A. I have met the lady; I cannot say that I am.

Q. Have you ever sold her any property; if so, what?

A. I have sold her husband some for her; the south half of lot 18.

Q. Did you ever convey it?

A. No, sir; I did not.

Q. Did you make a contract?

A. I made a contract; yes, sir.

Q. Is it of record?

160 A. Not to my knowledge.

Q. What part of 18 did you sell her; what consideration?

A. It was the south half, I think, the south 165 feet or south half.

Q. What was the amount of the purchase-money?

A. I think it was $11,500.

Q. Any of it paid down; if so, how much?

A. No, sir; nothing paid down.
Q. Anything paid since the execution of the contract?
A. No, sir; I think not.
Q. Nothing paid on that?
A. Nothing been paid on that at all.
Q. Who has been in possession since the making of the contract?
A. They have.
Q. Made any improvements?
A. Yes, sir.
Q. About what?
A. I understand seven or eight or ten thousand dollars' worth; something like that.
Q. When was that sale made?
A. About a year ago, a little more or less.
Q. Let me refresh your recollection. Wasn't it on or about the 9th day of February, 1874, not quite a year ago?
A. I said a year ago; maybe a little more or less.
Q. Then you have not received the purchase-money amounting to about $11,500?
A. No, sir; or a portion of it.
Q. Is it in anybody's hands for you; if so, in whose?
161 A. Is what in anybody's hands?
Q. The purchase-money.
A. They are only to make about fifteen hundred dollars cash payment, I think; the balance on five years' time, I think—three or five years.
Q. Did you hold any securities for that money executed by M'r Tillinghast or M'r's Tillinghast?
A. No, sir; no further than the improvements may be considered as security.
Q. You sold it on five years' time?
A. The bulk of it, I think, either three or five years.
Q. You have not got their note for the money?
A. No, sir.
Q. Anybody else got it for you in escrow?
A. No, sir, not to my knowledge. I closed up the sale on account of this Powell matter.
Q. And the payment and giving your deed, and receiving the security was conditional on the settlement of this Powell matter?
A. Clearing the title; yes, sir. There is also an incumbrance of $7,500 on the whole block.
Q. To Wheeler?
A. This Pickett matter; yes, sir.
Q. Who transacted this business between you and the Tillinghasts in this purchase; anybody but the Tillinghasts?
A. Probably M'r Peck introduced him.
Q. The lawyer?
A. No, sir; the real-estate man; it is something that was done partially through him.
Q. What is M'r Tillinghast's full name?
A. I don't recollect.
162 Q. Of whom did you purchase the property that you afterwards called Packer's subdivision, prior to your subdivision?
A. Of Powell.
Q. Didn't you purchase from Henry H. Walker?

A. I think I did purchase through Henry H. Walker the forty acres; yes, sir, that was the case.

Redirect examination by M'r Pence:

Q. When Henry H. Walker conveyed the premises to you by a quit-claim deed, did you assume payment of the Powell mortgage?

A. It was understood that I was to pay the Powell mortgage. The property really was mine that was purchased from Powell at the time, although it was taken from Henry H. Walker at the time.

(Signature waived by consent of counsel.)

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT, *vs.* HENRY H. WALKER ET AL., DEFENDANT'. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, on the 24th day of November, A. D. 1874, at 2 p. m.

Present, M'r Mulvey of counsel for complainant, and Mess'rs Pence, Quigg, and Alexander of counsel for defendants.

Testimony of Elias Greenbaum.

ELIAS GREENBAUM, a witness on behalf of the defendants, being first duly sworn, was examined in chief by M'r Pence, and deposes and says as follows:

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Int. 1. Please state your name, age, residence, and occupation.

Ans. Elias Greenbaum.

Q. What do you know about the payment of the notes secured by the Pickett trust-deed upon block 16 in Packer's subdivision in question?

A. I know that the note was paid at the Prairie State Loan and Trust Company Bank on the west side.

Q. How did you know?

A. They have shown it on the copy-book.

Q. What interest had you in the matter at the time?

A. I wanted to buy the Kinney mortgage.

Q. Then the Wheeler trust-deed stood ahead of the Kinney mortgage?

A. Yes, sir; because it was not released.

Q. And you went with M'r Walker to this bank and they showed you a letter which they had written?

A. Yes, sir.

Q. They admitted the money had been paid there at the bank?

A. Yes, sir; that money and interest on the other.

Q. Have you talked to M'r Grant since about the notes and trust-deed upon blocks 17 and 18?

A. At the time there was; I went to M'r Grant to see what mortgages he held.

Q. You made this investigation at the time with reference to the purchase of the trust-deed of Kinney to Rogers?

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A. Yes, sir.

Q. The late firm of Greenbaum and Foreman still own and hold the trust-deed of Kinney to Rogers to secure a note of $12,000?

A. Yes, sir.

Q. It has not been paid or any part of it?

A. No, sir.

Q. And that is the Kinney trust-deed referred to upon block sixteen?
A. Yes, sir.
Q. A portion of that trust-deed was afterwards released, was it not, when M'r Orvis purchased the south 100 feet?
A. Yes, sir.
Q. And you took a trust-deed of Orvis as collateral to that?
A. Yes, sir.
Q. But the note has not been paid or any portion of it?
A. The note has not been paid or any portion of it.
Q. I understand, then, that the Orvis note of $4,000 on the south 100 feet is held by you as collateral security to the Kinney note and trust-deed?
A. Yes, sir.
Q. And that is the same trust-deed which is in my possession and which was produced here upon the other examination?
A. Yes, sir.
Q. The Orvis and the Kinney trust-deed?
A. Yes, sir.

165 Cross-examination by M'r Quigg:

Q. I understand that the information which you have regarding the payment of this note you got from the cashier of the Prairie State Loan and Savings Company?
A. Yes, sir.
Q. You have no personal knowledge in regard to the payment?
A. No other knowledge than that received from the——
Q. The knowledge you received you derived from a letter-press copy of a letter?
A. Yes, sir.
Q. And from the cashier?
A. Yes, sir.
Q. I will ask you if that letter specified upon what block this payment was made, or did it mention a payment of money generally?
A. It mentioned the principal which was due and the interest on the other note.
Q. That was all?
A. Yes, sir; the $7,500 which was due that day, on the 5th of October, due that day, and the interest on the three, interest on that and interest on the other mortgages which were not due.

Redirect examination by M'r Pence:

Q. Did M'r Walker tell you at the time you bought the Kinney mortgage that the notes secured by 16 had been paid?
Ans. Yes, sir.
(Signature waived by consent of counsel.)

166 In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER ET AL., DEFENDANT. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, on the 24th day of November, A. D. 1874, at 2 p. m.

Present, M'r Mulvey, of counsel for complainant, and Mess'rs Pence, Quigg, and Alexander, of counsel for defendant.

Testimony of Hugh Alexander, j'r.

HUGH ALEXANDER, j'r, a witness on behalf of the defendant, being first duly sworn, deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. Hugh Alexander, j'r, attorney. I had in my possession a short time ago a chattel-mortgage of Orvis to W'm P. Frailey and M'r Frailey, released and cancelled the same upon its face as fully paid. The same has been lost and I cannot now find it.

(Signature waived by consent of counsel.)

A. M. Pence, having been previously sworn, offered in evidence the deed of Samuel J. Walker to Patrick Brennick of block 15 in Packer's subdivision, which deed was filed for record on the 10th day of October, 1872, in the recorder's office of Cook County, Illinois.

MEM.—M'r Pence retains the possession of the original instrument.

(Signature waived by consent of counsel.)

167 *Quitclaim deed.*

Deed from Ralston to N. W. Fertilizing Co.

This indenture, made this third (3d) day of October, in the year of our Lord one thousand eight hundred and seventy-one, (A. D. 1871), between Robert W. Ralston, of the city of Chicago, county of Cook and State of Illinois, (bachelor), party of the first part, and the Northwestern Fertilizing Company, organized under special charter and located and doing business in the city of Chicago, county of Cook and State of Illinois, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar ($1.00) in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, hath remised, released, sold, conveyed, and quitclaimed, and by these presents doth remise, release, sell, convey, and quitclaim unto the said party of the second part, its successors or assigns forever, all the right, title, interest, claim, and demand which the said party of the first part hath in and to the following-described lot, piece, or parcel of land, to wit, block number seventeen (17) in Packer's subdivision of the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼) of section number five (5), township number thirty-eight (38) north, range fourteen (14) east, of the third (3d) principal meridian; said premises lying and being in the county of Cook and State of Illinois, subject, however,

168 to the following-described incumbrance which said party of the second part, its successors or assigns, agree to pay at maturity two (2) certain promissory notes bearing date October 2d, 1871, executed by said Robert W. Ralston, for the sum of five thousand dollars ($5,000.00) each, payable respectively in two (2) and three (3) years from the date thereof at the office of said Northwestern Fertilizing Co., Chicago, Illinois, and bearing interest at the rate of eight per cent. (8%) per annum, payable semi-annually and secured by trust-deed on said above-described premises bearing date October 2d, 1871, executed by said Robert W. Ralston to John G. Rogers, trustee, said notes being made payable to the order of Samuel J. Walker:

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining, and all the estate, right, title, interest, and claim whatever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, its successors or assigns forever.

And the said Robert W. Ralston, party of the first part, hereby expressly waives and releases any and all right, benefit, privilege, advantage, and exemption under or by virtue of any and all statutes of the State of Illinois, providing for the exemption of homesteads from sale on execution or otherwise, and especially under the act entitled "An act to exempt homesteads from sale on execution," passed by the general assembly of the State of Illinois, A. D. 1851, and approved February 11, A. D. 1851, and an act entitled "An act to amend an act
169 entitled 'An act to exempt homesteads from sale on execution,'" passed by said assembly A. D. 1857, and approved February 17, A. D. 1857.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

R. W. RALSTON. [SEAL.]

[50-ct. U. S. int. rev. stamp cancelled.]

STATE OF ILLINOIS,
City of Chicago, Cook County, ss:

I, George G. Street, a notary public in & for said city, in said county, in the State aforesaid, do hereby certify that Robert W. Ralston, who is personally known to me to be the same person whose name is subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this fourth day of September, A. D. 1872.

[SEAL.] GEORGE G. STREET,
Notary Public.

(Endorsed:) Quit-claim deed from Robert W. Ralston to the Northwestern Fertilizing Co. No. 54093.

STATE OF ILLINOIS,
Cook County:

The within deed was filed for record in the recorder's office of
170 Cook County on the 4 day of Sept., A. D. 1872, at o'clock m., and duly recorded in book 43 of records, page 40.

N. T. GASSETTE,
Recorder of County.

Warranty deed.

Deed of S. J. Walker et ux. to Ralston.

This indenture, made this second (2d) day of October, in the year of our Lord one thousand eight hundred and seventy-one (A. D. 1871), between Samuel J. Walker and Amanda M. Walker, his wife, of the city of Chicago, county of Cook, and State of Illinois, party of the first part,

and Robert W. Ralston, of the city, county, and State aforesaid, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of fifteen thousand ($15,000) dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said party of the second part, his heirs and assigns, all the following-described lot, piece, or parcel of land situated in *in* the county of Cook and State of Illinois, to wit, block numbered seventeen (17) in Packer's subdivision of the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼) of section number five (5), township number thirty-eight (38) north, range fourteen (14) east of the third (3d) principal meridian in the county and State aforesaid, together with all
171 and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances, to have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

And the said Samuel J. Walker and Amanda M. Walker, his wife, party of the first part, hereby expressly waive, release, and relinquish unto the said party of the second part, his heirs, executors, administrators, and assigns, all right, title, claim, interest, and benefit whatever in and to the above-described premises, and each and every part thereof, which is given by or results from all laws of this State pertaining to the exemption of homesteads.

And the said Samuel J. Walker, of the party of the first part, for himself and his heirs, executors, and administrators, doth covenant, grant, bargain, and agree, to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in law and in fee-simple, and hath good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form
172 aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and encumbrances, of what kind or nature soever, and the above-bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In testimony whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

SAM'L J. WALKER. [SEAL.]
AMANDA M. WALKER. [SEAL.]

[$14.50 rev.-stamps, cancelled.]

STATE OF ILLINOIS,
City of Chicago, Cook County, ss:

I, George G. Street, a notary public in & for said city, in said county, in the State aforesaid, do hereby certify that Samuel J. Walker and Amanda M. Walker, who are personally known to me as the same persons whose names are subscribed to the annexed deed, appeared before

me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument in writing, as their free and voluntary act, for the uses and purposes therein set forth.

And the said Amanda M. Walker, wife of the said Samuel J. Walker, having been by me examined, separate and apart and out of the
173 hearing of her husband, and the contents and meaning of the said instrument of writing having been by me fully made known and explained to her, and she also by me being fully informed of her rights under the homestead laws of this State, acknowledged that she had freely and voluntarily executed the same and relinquished her dower to the lands and tenements therein mentioned, and also all her rights and advantages under and by virtue of all laws of this State relating to the exemption of homesteads, without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and notarial seal this eighteenth day of October, A. D. 1872.

[SEAL.] GEORGE G. STREET,
Notary Public.

(Endorsed:) Warranty deed. Samuel J. Walker & wife to Robert W. Ralston. No. 54094.

STATE OF ILLINOIS,
Cook County, ss:

Norman T. Gassette, clerk of the circuit court and ex officio recorder within and for the county of Cook and State aforesaid, do hereby certify that the within and foregoing instrument of writing was filed for record on the 4 day of Sept., A. D. 1872, at o'clock m., and duly recorded in volume 130 of records, on page 316.

In testimony whereof I have hereunto set my hand.

N. T. GASSETTE, *Clerk.*

174 EXHIBIT K.

Transcript of appointment of assignees in bankruptcy matter of People's Safe Deposit and Savings Ins. of N. Y.

No. 3616.

UNITED STATES OF AMERICA,
District Court, Clerk's Office, Northern District of New York, ss:

I, Winfield Robbins, clerk of said court, do hereby certify that I have compared the annexed copy of memorandum of appointment of assignees with the original memorandum of appointment of assignees entered and on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof I have caused the seal of the said court to be affixed, at the city of Buffalo, in said district, this 23rd day of January, A. D. 1875.

WINFIELD ROBBINS, *Clerk.*

In the district court of the United States for the northern district of New York.

175 IN THE MATTER OF THE PEOPLE'S SAFE Deposit and Savings Institution of the State of New York, bankrupt. } In bankruptcy.

At Oneida, in said district, on the 28th day of January, A. D. 1873, before me, C. Carskadden, register in bankruptcy.

DISTRICT OF NORTHERN NEW YORK, *ss:*

Memorandum.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, whereof the notice required in that behalf has been duly given, I, the undersigned, register of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of assignee under the said bankruptcy, and I do hereby certify that the greater part in value of the creditors who have proved their debts were present, or duly represented, and made choice of Daniel Pratt, of Syracuse, in the county of Onondaga, and State of New York, and Charles S. Symonds, of Utica, in the county of Oneida, & State of New York, as the assignees of the said bankrupt estate.

That after an exhibition of proxies, representing 1,407 in number and $474,902.26 in value, of the creditors who have proved their debts, it was unanimously resolved that Daniel Pratt, of Syracuse, and Charles S. Symonds, of Utica, be appointed assignees in this matter.

That said meeting was continued by me until Jan. 29th, to al-
176 low other creditors to attend and express their choice, and the majority, both in number & value, of the creditors who had proved their debts having failed to make choice of any assignee or assignees, and there being no opposing interest, I approved and confirmed the unanimous choice of the creditors who were present or represented, and thereupon appointed the said Daniel Pratt and Charles S. Symonds assignees of said bankrupt estate.

C. CARSKADDEN,
Register in Bankruptcy.

(Endorsed:) Within choice & appointment of assignees approved Feb. 11, 1873. N. K. Hall, U. S. district judge N. Dist. of N. Y. Filed Feb. 11, 1873.

EXHIBIT L.

Transcript of assignment in bankruptcy, matter of People's Safe Deposit and Savings Institution of N. Y.

No. 3616.

UNITED STATES OF AMERICA,
District Court Clerk's office, Northern District of New York, ss:

I, Winfield Robbins, clerk of said court, do hereby certify that I have compared the annexed copy of assignment with the original copy entered and on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof I have caused the seal of the said court to be

affixed, at the city of Buffalo, in said district, this 23d day of January, A. D. 1875.

[SEAL.] WINFIELD ROBBINS,
Clerk.

177 *Assignment of bankrupt's effects.*

In the district court of the United States for the northern district of New York.

IN THE MATTER OF THE PEOPLE'S SAFE DEPOSIT and Savings Institution of the State of New York, bankrupt. } In bankruptcy. No. 3616.

DISTRICT OF NORTHERN NEW YORK, ss:

Know all men by these presents that Daniel Pratt, of the city of Syracuse, in the county of Onondaga, & State of New York, and Charles S. Symonds, of the city of Utica, in the county of Oneida, and State aforesaid, have been duly appointed assignees in said matter:

Now, therefore, I, Clarence Carskadden, register in bankruptcy of said district, by virtue of the authority vested in me by the 14th section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said Daniel Pratt and Charles S. Symonds, assignees as aforesaid, all the estate, real and personal, of the said The People's Safe Deposit and Savings Institution of the State of New York, bankrupt aforesaid, including all the property, of whatever kind, of which it was possessed or in which it was interested or entitled to have on the 16th day of Sept., A. D. 1872, with all its deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said
178 14th section of said act:

To have and to hold all the foregoing premises to the said Daniel Pratt and Charles S. Symonds and their heirs forever, in trust, nevertheless, for the use and purposes, with the powers and subject to the conditions and limitations set forth in said act.

In witness whereof I, the said register, have hereunto set my hand and caused the seal of said court to be affixed this 14th day of Feb'y, A. D. 1873.

[L. S. OF THE COURT.] C. CARSKADDEN,
Register in Bankruptcy.

(Endorsed:) Filed February 18, 1873.

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER & CROSS-BILL OF SHERMAN A. RICKER, defendant. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Saturday, March 6th, 1875.

Present, M'r Smith, of Fuller & Smith, of counsel for and the witness below named.

In the district court of the United States for the northern district of New York.

175 IN THE MATTER OF THE PEOPLE'S SAFE Deposit and Savings Institution of the State of New York, bankrupt. } In bankruptcy.

At Oneida, in said district, on the 28th day of January, A. D. 1873, before me, C. Carskadden, register in bankruptcy.

DISTRICT OF NORTHERN NEW YORK, *ss:*

Memorandum.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, whereof the notice required in that behalf has been duly given, I, the undersigned, register of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of assignee under the said bankruptcy, and I do hereby certify that the greater part in value of the creditors who have proved their debts were present, or duly represented, and made choice of Daniel Pratt, of Syracuse, in the county of Onondaga, and State of New York, and Charles S. Symonds, of Utica, in the county of Oneida, & State of New York, as the assignees of the said bankrupt estate.

That after an exhibition of proxies, representing 1,407 in number and $474,902.26 in value, of the creditors who have proved their debts, it was unanimously resolved that Daniel Pratt, of Syracuse, and Charles S. Symonds, of Utica, be appointed assignees in this matter.

That said meeting was continued by me until Jan. 29th, to al-
176 low other creditors to attend and express their choice, and the majority, both in number & value, of the creditors who had proved their debts having failed to make choice of any assignee or assignees, and there being no opposing interest, I approved and confirmed the unanimous choice of the creditors who were present or represented, and thereupon appointed the said Daniel Pratt and Charles S. Symonds assignees of said bankrupt estate.

C. CARSKADDEN,
Register in Bankruptcy.

(Endorsed:) Within choice & appointment of assignees approved Feb. 11, 1873. N. K. Hall, U. S. district judge N. Dist. of N. Y. Filed Feb. 11, 1873.

EXHIBIT L.

Transcript of assignment in bankruptcy, matter of People's Safe Deposit and Savings Institution of N. Y.

No. 3616.

UNITED STATES OF AMERICA.

District Court Clerk's office, Northern District of New York, ss:

I, Winfield Robbins, clerk of said court, do hereby certify that I have compared the annexed copy of assignment with the original copy entered and on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof I have caused the seal of the said court to be

affixed, at the city of Buffalo, in said district, this 23d day of January, A. D. 1875.

[SEAL.] WINFIELD ROBBINS,
Clerk.

177 *Assignment of bankrupt's effects.*

In the district court of the United States for the northern district of New York.

IN THE MATTER OF THE PEOPLE'S SAFE DEPOSIT and Savings Institution of the State of New York, bankrupt. } In bankruptcy. No. 3616.

DISTRICT OF NORTHERN NEW YORK, ss:

Know all men by these presents that Daniel Pratt, of the city of Syracuse, in the county of Onondaga, & State of New York, and Charles S. Symonds, of the city of Utica, in the county of Oneida, and State aforesaid, have been duly appointed assignees in said matter:

Now, therefore, I, Clarence Carskadden, register in bankruptcy of said district, by virtue of the authority vested in me by the 14th section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said Daniel Pratt and Charles S. Symonds, assignees as aforesaid, all the estate, real and personal, of the said The People's Safe Deposit and Savings Institution of the State of New York, bankrupt aforesaid, including all the property, of whatever kind, of which it was possessed or in which it was interested or entitled to have on the 16th day of Sept., A. D. 1872, with all its deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said
178 14th section of said act:

To have and to hold all the foregoing premises to the said Daniel Pratt and Charles S. Symonds and their heirs forever, in trust, nevertheless, for the use and purposes, with the powers and subject to the conditions and limitations set forth in said act.

In witness whereof I, the said register, have hereunto set my hand and caused the seal of said court to be affixed this 14th day of Feb'y, A. D. 1873.

[L. S. OF THE COURT.] C. CARSKADDEN,
Register in Bankruptcy.

(Endorsed:) Filed February 18, 1873.

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER & CROSS-BILL OF SHERMAN A. RICKER, defendant. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Saturday, March 6th, 1875.

Present, M'r Smith, of Fuller & Smith, of counsel for and the witness below named.

Testimony of Robert Hervey.

ROBERT HERVEY, a witness on behalf of Sherman A. Ricker,
179 being first duly sworn, was examined in chief by M'r Smith, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Q. You are a member of the firm of Hervey, Anthony & Gault?

A. Yes, sir.

Q. What, if anything, do you know in regard to a sale made by Samuel J. Walker to William Flannigan of certain lots in Packer's subdivision, so called?

A. I know that on or about the 11th of April, last year, 1874, M'r Walker sold M'r Flannigan block sixteen (16) in Packer's subdivision of the northeast ¼ of the southeast ¼ of section 5, 38, 14, and received a deed for it. M'r Franklin gave three notes for part of the purchase-money, each note for ($3,666.66) three thousand six hundred and sixty-six dollars and sixty-six cents, payable in one, two, and three years after date, with interest at eight per cent., secured by trust-deed on the property purchased, which notes and trust-deed were left with me by the mutual agreement of M'r Flannigan and M'r Walker in escrow, when a release of a trust-deed upon & including the premises in question, made by John T. Kinney to John G. Rogers, trustee, on said block (16) sixteen, to secure the payment of $12,000.00, with interest, was delivered up to me. When that release was delivered up to me, I
180 was then to surrender the trust deed-deed to him, released for delivery. I still hold the notes trust under a certain arrangement.

Q. Have you any memorandum in writing of that agreement?

A. I have, sir; this is it. M'r Flannigan's notes for $3,666.66 each, payable in one, two, and three years, with a trust-deed on block 16, Packer's subdivision N.E. ¼ of S.E ¼ of section 5, township 38 N., range 14, have been left with M'r Hervey in escrow, to be delivered to M'r S. J. Walker when *when* release of trust-deed made by John T. Kinney to John G. Rogers, trustee, on said block 16, to secure the payment of $12,000.00, with interest, is delivered to said Hervey.

Q. Do you know whether M'r Flannigan entered in possession of said property?

A. Yes, sir; he went into possession as soon as he purchased it, and is in possession now, so far as I know.

Q. The notes that you speak of are still unpaid?

A. I have them still in my possession and hold them in escro'; I have no release.

Q. If you have any written paper setting forth that agreement, please read it to the reporter.

A. This is the paper:

I agree to procure a proper release of trust deed from Henry E. Pickett to Bacon Wilson to secure the payment of $7,500.00, with interest, secured on the N. E. ¼ of the S.W. ¼ of section 7, T. 38, R. 14 E. 3d
P. M; the note secured by said trust-deed having been paid by me
181 on the 4th of October, 1871, at the Prairie State Loan and Trust Company's office, and said trust-deed being no longer a lien on said block 16.

SAMUEL J. WALKER.

I will state that I accompanied M'r Walker, in order to satisfy myself, in his carriage to the office of the Prairie State Loan & Trust Company,

and ascertained there from a gentleman in charge, the cashier or president, that the note had been paid, as M'r Walker stated.

Q. Was that on or about the time the paper you hold in your hand was signed?

A. Yes, sir; it was on the very day or the day before.

Q. Have you the notes secured by the above trust-deed?

A. Yes, sir; the notes are precisely alike in amount and date, signed by the same person, William Flannigan, and read as follows, with the difference of time of payment: one payable in one year and the next in two years, and the last is payable in three years from the 27th day of February, 1874. I read the note payable in one year:

$3,666.66. CHICAGO, *February* 27, 1874.

One year after date I promise to pay to the order of Henry H. Walker three thousand six hundred and sixty-six $\frac{66}{100}$ dollars at the International Bank, Chicago, Illinois, value received, with interest at eight per cent. per annum.

WILLIAM FLANNIGAN.

This note is secured by trust-deed.

The other notes are precisely similar in phraseology, with the
182 exception that one note is payable in two years with interest and the other is payable in three years after date, and after the words eight per cent. per annum the words "payable annually."

Q. Did the cashier or president of the Prairie State Loan & Trust Company inform you at the interview you have spoken of in what manner the note and trust-deed had been paid?

A. M'r Walker spoke and said, "We have come here to satisfy M'r Hervey that these notes of William Flannigan of $7,500.00, due on the 4th of October, 1871, have been paid; and the gentleman turned to the book and said, "It had been." He did not say whether by check or draft. I was satisfied that it had been paid as M'r Walker had represented.

(Signature waived by consent.)

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL, COMPLAINANT,
vs.
HENRY H. WALKER & CROSS-BILL OF SHERMAN A. RICKER, defendant. } In chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Saturday, March 6, 1875.

Present, M'r Smith, of Fuller & Smith, of counsel for complainant, and the witness below named.

Testimony of Daniel L. Boone.

DANIEL L. BOONE, a witness on behalf of Sherman A. Ricker, being first duly sworn, was examined in chief by M'r Smith, and deposes
183 and says as follows:

Int. 1. Please state your name, age, residence and occupation.

Ans. Daniel L. Boone; age, 40 years; occupation, insurance agent residence, Chicago

Q. You are a son of Levi D. Boone, are you not?
A. Yes, sir.
Q. And a brother of Louisa M. Tillinghast?
A. Yes, sir.
Q. Do you know Dan'l W. Tillinghast?
A. Yes, sir.
Q. He was the husband of Louisa Tillinghast?
A. Yes, sir.
Q. Is he now dead; and, if so, where did he die?
A. Yes, sir. He died at my house, about the last of April, 1874?
Q. What, if anything, did you know, M'r Boone, of a contract entered into between said Daniel W. Tillinghast, in his life-time, and Samuel J. Walker in relation to certain premises in Packer's subdivision?
A. I simply knew the fact that such a contract did exist between D. W. Tillinghast and Sam'l J. Walker.
Q. Do you know whether that contract was reduced to writing or not?
A. I believe it was.
Q. And what was the substance of it?
A. It was reduced to writing, but never signed, because Tillinghast died pending the negotiations, as I understand the substance of the contract. I would not know without going over it, and I have not examined the papers.

184 Q. Do you know whether or not Louisa M. Tillinghast or her husband, Daniel W. Tillinghast, entered into the possession of any portion of Packer's subdivision; and, if so, whether it was the south half of block 18 in said subdivision?
A. I think M'r Tillinghast did enter into possession.
Q. And commenced building upon that piece of ground?
A. You mean by that piece of ground the south half of block 18, Packer's subdivison of the N. E. ¼ of the S. E. ¼ of sec. 5, tp. 38 N., R. 14 E., of 3d P. M.
Q. Yes, sir.
A. Yes, sir.
Q. After entering into possession of that property you have just described, what did M'r Tillinghast do?
A. He built what is ordinarily & commonly known as a killing-house on the premises, which was about ready for occupation by himself when he took sick at my house and died.
Q. Do you know what was the contract-price agreed to be paid by M'r Tillinghast or his wife, Louisa M. Tillinghast, to Samuel J. Walker for that property?
A. My recollection is, somewhere in the neighborhood of from $11,000 to $11,500.
Q. Was it $11.943.41?
A. About that; that sum I should state.
Q. Do you know whether that sum, or any portion of it, as having been paid of the consideration money?

185 A. That I am not able to state.
Q. What, if anything, do you know about the contract entered into between W'm F. Coolbaugh, Heman G. Powers, and M'r's Louisa M. Tillinghast, in relation to the premises above described?
A. I now hold in my hand contract which would determine that.
Q. Where did you get that paper which you now hold in your hand?
A. This contract has been in the possession of D'r L. D. Boone, and I obtained it from him this morning at his house.

Q. He is now confined to his house by illness, is he not?

A. Yes, sir.

Q. Can you leave that paper with the master in chancery for the purpose of examining and reporting as an exhibit in this case?

A. Well, I was instructed to return it.

Q. If you do not care to leave it, will you please to read it, so that the reporter can take it down? (Reads:)

CHICAGO, *Sept. 3d*, 1874.

Memorandum of agreement make and entered into this day between W. F. Coolbaugh, Heman G. Powers, and Samuel J. Walker, of the city of Chicago, county of Cook, State of Illinois, parties of the first part, and Louisa M. Tillinghast, wife of Daniel W. Tillinghast, of the said county and State aforesaid, of the second part, witnesseth:

That whereas on or about the 9th day of February, 1874, the aforesaid Samuel J. Walker contracted with Daniel W. Tillinghast
186 aforesaid to sell to his wife, Louisa M. Tillinghast aforesaid, the south half of block eighteen (18), in Packer's subdivison of the northeast quarter of the southeast quarter of section No. five (5), township No. thirty-eight (38) north, of range fourteen (14) east, of the third (3d) principal meridian, for the sum of eleven thousand five hundred and ninety-three ⅝ dollars ($11,593.41), said sum or consideration to be paid as follows, to wit: The sum of one thousand ($1,000) dollars to be paid upon the execution and delivery of the contract of sale, which sum *which* was understood was to be expended in the building of a railroad track on the west side of the said track, to be connected with the main railroad track laid to and from the Union stock yards, and which track was to be completed and in good running order in ninety (90) days from the date of said agreement.

Second. The said S. J. Walker is bound to produce an abstract showing good title to the property above described and the presentation of a good and sufficient warranty deed for the same, when the further sum of five thousand nine hundred and thirty-four (5,934) dollars was to be paid by said Tillinghast.

Third. Said Louisa M. Tillinghast was to execute her promissory note for the sum of ten thousand (10,000) dollars, dated upon the said 9th day of February, 1874, payable five (5) years from the date thereof, with interest at eight (8) per cent. per annum, payable semi-annually.

187 And whereas it was provided and agreed between the parties to said contract that said Tillinghast might enter into possession of the said lots and proceed to the erection of buildings thereon without let or hindrance from said Walker, and should not be compelled to carry out her portion of said agreement until the completion of said railroad-track as above described, said Tillinghast agreeing to pay all taxes & assessments for the year 1874, including the park assessment:

And whereas said Tillinghast did enter into possession of said lots and proceed in good faith to erect buildings and other improvements on said , for the purpose of killing and packing cattle, hogs, etc., and has in good faith carried on said improvements to completion, at an expenditure of a large sum of money, to wit, the sum of eight or nine thousand dollars;

And whereas it now appears from the records that there are incumbrances on said lots, that mortgages, or trust-deeds, or both, the

amount of which incumbrances cannot at present be definitely determined;

And whereas the said parties of the first part are desirous to carry out in good faith the agreement above substantially set forth, so far as it is in their power so to do:

Therefore it is understood and agreed by the parties to these presents that upon the payment by the said Louisa M. Tillinghast, her heirs or assigns, of a pro rata portion of any indebtedness hereafter to be
188 determined by legal decision or otherwise, for which above lots may be liable, any part of which such other parties may be jointly holding for such indebtedness, and the payment of the balance of said purchase-money, if any there may be remaining of above money, W. F. Coolbaugh, Heman G. Powers, they will execute and deliver to the said Louisa M. Tillinghast, her heirs and assigns, a good and sufficient deed of conveyance by quit-claim, all and singular the above described premises, the said Samuel J. Walker undertaking in this agreement, for the purpose of signifying his consent to this contract and the facts herein stated, and his approval of the agreement herein entered into upon the part of the said Coolbaugh and Powers, and also for the purpose of reaffirming, and he does hereby reaffirm & promises to carry out his aforesaid contract to convey by warranty deed the premises hereinbefore described to the said Louisa M. Tillinghast, her heirs and assigns.

And it is further agreed by the parties of the first part, that the said Louisa M. Tillinghast shall continue to have and to hold quiet and peaceable possession, use, and enjoyment of said premises so long as she shall in good faith carry out the promises hereinbefore recited to be performed by her, hereby fully agreeing that she and her heirs and assigns will faithfully keep and perform the obligation hereinbefore recited.

189 It is also further understood & agreed by the parties hereto, that the party of the second part, her heirs and assigns, may proceed to construct and lay down the railroad-track hereinbefore mentioned, and that the cost of said construction shall be deducted out of the payment of this purchase-money, agreed to be paid by the said party of the second part to said Samuel J. Walker, and the parties of the first part also agree that the right of way for the above railroad-track shall be provided by him, the said Coolbaugh and Powers hereby agreeing to quit-claim said right of way through the blocks held by them.

It is further mutually agreed by the parties to these presents that the agreements & obligations herein contained shall be binding upon the heirs, executors, administrators, and assigns of the respective parties hereto, but the said Coolbaugh and Powers shall in no event be pecuniarily liable under this agreement; provided they shall as aforesaid quit-claim these premises and said right of way.

In witness whereof the parties to these presents have hereunto subscribed their hands and seals the day and year above written.

W. F. COOLBAUGH. [SEAL.]
HEMAN G. POWERS. [SEAL.]
M'R'S LOUISA M. TILLINGHAST. [SEAL.]

foAPPENDED.—The railroad-track and right of way alluded to in the regoing contract, it is understood is to be used in common with

190 the other property or subdivisions in said section five (5), & when so built to be kept in repair by the owners of the property using the same.

SAMUEL J. WALKER. [SEAL.]

Q. Who is in possession of these premises now?

A. I have forgotten the name.

Q. Is M'r's Tillinghast still the owner, so far as you know?

A. Yes, so far as I know; that is what personal property there has been put on there still exists.

Q. What is the value in your judgment of these lots, without the improvements, and what of the lots with the improvements?

A. At the time of the contract or agreement to convey by Walker to Tillinghast I should consider it worth about $5,000 an acre. My impression is there was about two acres of ground, that would make it about $10,000; that this construction of railroad-track after the improvements are put on, I should say it is worth in the neighborhood of from $20,000 to $22,000.

(Signature waived by consent.)

(Endorsed:) Filed March 27, 1875. W'm H. Bradley, cl'k.

191 Afterwards, to wit, on the 5th day of April, A. D. 1875, said defendant, Sherman A. Ricker, by his solicitors, filed in said clerk's office his exceptions to the said report of the master in chancery in said entitled cause, which said exceptions are in the words and figures following, to wit:

Exceptions to the report of the master in chancery.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In circuit court of the United States in & for said district.

NATHAN POWELL
vs.
HENRY H. WALKER, SHERMAN A. RICKER, et al. } Bill & cross-bill.

And now comes the said Sherman A. Ricker, one of the defendants in the original bill of complaint herein and complainant in the cross-bill herein, by Fuller & Smith, his solicitors, and excepts to the report of the master in chancery heretofore, to wit, on the 27th day of March, A. D. 1875, filed herein, for the following reasons, viz:

EXCEPTION 1. Said report finds that block fourteen (14), Packer's subdivision, &c., owned by said Sherman A. Ricker, is first liable to sale under said mortgage, whereas it should find that said lot is not first liable to sale.

EXCEPTION 2.—Said report does not find that block sixteen (16)
192 is liable to sale before block fourteen (14), whereas it should find that said block sixteen (16) is so liable to sale before said block fourteen (14).

EXCEPTION 3.—Said report does not find that the 201 feet of block sixteen (16) is liable to sale before said block fourteen (14), whereas it should so find.

EXCEPTION 4.—Said report does not find that the 100 feet of said block sixteen (16) is liable to sale before said block fourteen (14), whereas it should so find.

EXCEPTION 5.—Said report does not find that the south half (S. ½) of block eighteen (18) in said Packer's subdivision should be first sold under said foreclosure proceedings, whereas it should so find.

EXCEPTION 6.—Said report does not (in terms) find that the securities in the hands of Robert Hervey, esq., are liable to sale before any portion of the mortgaged premises can be sold, whereas it should so find.

Wherefore, the said Sherman A. Ricker excepts to the said report of the master in chancery filed herein, and appeals therefrom to the judgment of this hon. court.

FULLER & SMITH,
Solicitors for S. A. Ricker.

(Endorsed:) Filed April 5, 1875. W'm H. Bradley, cl'k.

193 Afterwards, to wit, on the 8th day of April, A. D. 1875, in the adjourned March term of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs.
HENRY H. WALKER ET AL. } In chancery.

On motion of complainant's solicitor, it is ordered by the court that the report of Henry W. Bishop, esq., master in chancery, of the amount due the complainant herein heretofore filed in this cause, be ratified unless cause be shown to the contrary by Monday morning next.

Afterwards, to wit, on the 14th day of April, A. D. 1875, in the said adjourned March term of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs.
HENRY H. WALKER. } In chancery.

On motion, the exceptions to the master's report herein are set for hearing on Monday, the twenty-sixth day of April instant.

194 Afterwards, to wit, on the 26th day of April, A. D. 1875, in the said adjourned March term of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs.
HENRY H. WALKER ET AL. } In chancery.

On motion, the hearing on exceptions to report of master herein is postponed to a future day.

Afterwards, to wit, on the 12th day of May, A. D. 1875, in the adjourned May term of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs.
HENRY H. WALKER ET AL. } In chancery.

Now come the defendants, by their solicitors, and come on to be heard the exceptions of S. A. Ricker to the report of Henry W. Bishop, esq., master herein, and after hearing the same, the court, not being now sufficiently advised in the premises, takes time to consider.

Afterwards, to wit, on the 15th day of May, A. D. 1875, in the said adjourned May term of said court, in the record of the proceed-
195 ings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs.
HENRY H. WALKER ET AL. } In chancery.

Now come the parties, by their solicitors, and this cause having been heretofore brought on to be heard upon the exceptions of S. A. Ricker to the report of the master filed herein, and the same having been fully argued and considered, the court sustains said exceptions so far as they relate to block fourteen therein mentioned, which was by said master found to be first liable to sale under this proceeding; and it is therefore ordered that said report be reformed by providing that block sixteen (16) shall first be sold in the way mentioned in said report, and after that block fourteen (14), and that then the order of sale as indicated in said report shall be followed.

Afterwards, to wit, on the 5th day of June, A. D. 1875, in the said adjourned May term of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Decree.

NATHAN POWELL
vs.
196 HENRY H. WALKER, SAMUEL J. WALKER, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Herman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brennock, Patrick Brennock, Julius Rosenthal, Emerson G. Orvis, Elias Greenebaum, Mary E. Orvis, John Somes, William P. Frailey, William Flannigan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Walson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third National Bank of St Louis, James Q. Minschell, John P. Squire, Gerhard Foreman, Levi Abt, The International Bank, Charles S. Symonds, and Daniel Pratt, as assignees in bankruptcy of The People's Safe Deposit and Savings Institution of the State of New York. } In chancery.

This cause having this day been brought on to be heard upon the bill

of complaint filed herein, and the answers thereto respectively of the defendants, Henry H. Walker, Samuel J. Walker, John G. Rogers, Sherman A. Ricker, William F. Coolbaugh, Addie R. Coolbaugh, Herman G. Powers, Sarah E. Powers, John Brennock, Patrick Brennock, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, John P. Squires, John Somes, William P. Frailey, Abner Taylor, The Northwestern Fertilizing Company, Elias Greenebaum, Gerhard Foreman, Levi Abt, The International Bank, Francis A. Hoffman, and upon the answer of Charles S. Symonds and Daniel Pratt as assignees in bankruptcy of the People's Safe Deposit and Savings Institution of the State of New York, and upon the replications of the complainant to such answers, respectively; and upon said bill of complaint taken as confessed by Brian Philpot, Adeline M. Philpot, Bacon Wheeler, Wirt Dexter, William Flannigan, Flannigan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Cyrus H. McCormick, The Third National Bank of S't Louis, James Q. Minsehall, the other of said defendants, and also upon the cross-bill of complainant filed in said cause by Sherman A. Ricker, one of the defendants to said cause, taken as confessed by all the defendants therein named, and also upon the cross-bill of complaint filed in said cause by Emerson G. Orvis, another of said defendants, and upon the report of the master in chancery with the testimony of the several witnesses, and other proofs therewith submitted, heretofore filed herein; and the court having also considered the stipulation of Samuel J. Walker, Henry H. Walker, Louisa M. Tillinghast, and William Flannagan, also filed herein, and having heard the allegations
198 and proofs and pleas of the several counsel, and being now fully advised in the premises, finds that the south one-half (S. ½) of the northeast one-quarter (N. E. ¼) of the southwest one quarter (S. W. ¼) of section five (5), township thirty-eight (38) north, of range fourteen (14) east, of the third (3d) principal meridian, in Cook, County, in the State of Illinois, is the property covered by the mortgage to the said Nathan Powell, complainant herein, and liable for the payment of the amount now due on the note secured by said mortgage, to wit, the sum of fourteen thousand eight hundred and fifty-three dollars and thirty-three cents.

The court also finds that the material allegations of the cross-bill filed herein by Sherman A. Ricker, one of the defendants, are sustained by the proofs, and that there is in the hands of Louisa M. Tillinghast, and in the hands of Robert Hervey, attorney of William Flannagan, certain moneys, notes, or securities arising from sales or contracts of sale of portions of the above-described premises so as aforesaid conveyed in mortgage to the said Nathan Powell, which ought in equity to be brought into court here to be sold under the direction of the court, and first applied to the liquidation of the amount due on said mortgage of said complainant as set out in said cross-bill, and under and according to the stipulation aforesaid filed herein.

The court also finds that the premises covered by said mort-
199 gage as aforesaid have been subdivided since the date of said mortgage, and that the property covered by said mortgage is now known and described as blocks thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), of Packer's subdivision of the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼) of section five (5), township thirty-eight (38) north, of range fourteen (14) east, of the third (3d) principal meridian. That since the giving of said mortgage by Henry H. Walker to said complainant, conveyances of

different blocks and parts of blocks in said subdivision have been made, and that, following the inverse order of the alienation thereof, the said blocks and parts of blocks are liable to be, and should be, sold in the following order, viz:

First. The north two hundred and one (201) feet of block sixteen in said subdivision, excepting and reserving therefrom all the estate, right, title, interest, claim, property, and demand of the said John G. Rogers and of the said Elias Greenebaum and Gerhard Foreman therein, under and by virtue of the certain deed of trust executed by John D. Kinney to said John G. Rogers, bearing date the twenty-fifth day of November, A. D. 1872, and filed for record in the recorder's office of Cook County, Illinois, on the twenty-third day of October, A. D. 1873, and recorded therein in book 266, on page 453, and subject thereto.

200 Second. The south one hundred (100) feet of said block sixteen.

Third. Block fourteen (14) in said subdivision.

Fourth. All the said estate, right, title, interest, claim, property, and demand of the said John G. Rogers and of the said Elias Greenebaum and Gerhard Foreman of, in, and to said north two hundred and one (201) feet of said block sixteen (16), under and by virtue of said deed of trust so as aforesaid executed by said John D. Kinney to said John G. Rogers, hereinbefore excepted and reserved.

Fifth. Blocks thirteen (13) and eighteen (18) in said subdivision.

Sixth. Block fifteen (15) in said subdivision.

Seventh. Block seventeen (17) in said subdivision.

And this court, being fully advised in the premises, doth find and adjudge that all the material allegations in the said bill of complaint and in said cross-bill of Sherman A. Ricker contained have been fully proved, and that there is due to said Nathan Powell, the complainant in this cause, from the said defendants Henry H. Walker and Samuel J. Walker, the sum of fourteen thousand eight hundred and fifty-three dollars and thirty-three cents, with interest thereon from the seventeenth day of March, A. D. 1875, the date of said master's report.

It is therefore, upon motion of counsel for the complainant, ordered, adjudged, and decreed, and this court, by virtue of the power and

201 authority in it vested, doth order, adjudge, and decree, that the said Louisa M. Tillinghast pay or cause to be paid into court, within ten days from the entry of this decree, the sum of twelve thousand six hundred and sixty and $\frac{7}{100}$ dollars, being the amount due from said Louisa M. Tillinghast, as purchase-money of the south half of block eighteen (18), in said Packer's subdivision, according to the contract of sale heretofore executed between said Tillinghast, Samuel J. Walker, William F. Coolbaugh, and Heman G. Powers.

And it is further ordered, adjudged, and decreed, by the court, that the said William Flannagan pay or cause to be paid into court, within ten days from the day of the entry of this decree, the sum of eleven thousand eight hundred and forty-three $\frac{33}{100}$ dollars, being the amount agreed to be paid by said Flannagan, as part purchase-money, for the north two hundred and one (201) feet of block sixteen (16), in said Packer's subdivision, with accrued interest thereon; the said sums, and each of them, so to be paid into court to be applied under the direction of the court as the rights of the parties may appear, and as to equity shall seem meet.

It is further ordered, adjudged, and decreed by the court, that if the said Louisa M. Tillinghast and the said William Flannagan shall fail to pay, or cause to be paid, into court, within the time aforesaid, the

said several sums of money so as aforesaid ordered to be paid
202 into court, or if from any cause a sum of money sufficient to liquidate the amount due said complainant Powell on the mortgage aforesaid shall not be realized out of said Tillinghast and Flannagan moneys, so as aforesaid ordered to be paid into court, then it is further ordered, adjudged, and decreed by the court, that unless the said Henry H. Walker, or some of the other defendants in this case, pay or cause to be paid to the complainant, within one hundred days from the entry of this decree, the said sum so found to be due to the complainant, with interest thereon from the said seventeenth day of March, A. D. 1875, being the date of said master's report, the said mortgaged premises, or so much of same as may be necessary for the payment of the amount due on said mortgage, with costs of this suit, be sold by public auction, by or under the direction of the master in chancery of this court, and that said master make such sale in accordance with the course and practice of this court, and that at such sale the complainant, or any of the parties to this suit, may become the purchaser.

It is further ordered, adjudged, and decreed that said master first offer said premises separately, in parcels, in the manner and order as hereinbefore provided; and if, when offered in that way, an amount sufficient to pay what is due and owing to complainant cannot
203 be realized, that then the said master offer and sell said premises as a whole, by the description thereof herein first above named, and without reference to any subdivision thereof whatever, and without any exception or reservation therefrom whatever.

It is further ordered that the cross-bill of complaint, filed in this cause by said Emerson G. Orvis, be dismissed for want of equity.

It is further ordered that said master make report to this court of such sale, and of his acts and doings hereunder, for approval and confirmation, and for further direction herein, and that he retain from the proceeds of said sale the amount of his fees, disbursements, and commissions thereon, and bring the residue of such proceeds, if any, into court to abide the further order of the court; and that he take the receipt of the clerk of this court therefor, and file the same with said report; and if the moneys arising from such sale shall be insufficient to pay the amount so found and adjudged to be due to the complainant, with the interest thereon, and the costs of suit, and expenses of sale as aforesaid, that the said master specify the amount of such deficiency in his said report of sale.

And it is further ordered that the clerk of this court hold such moneys, so to be paid him by said master, subject to the further order and direction of this court in this cause.

204 Afterwards, to wit, on the 15th day of June, A. D. 1875, in the adjourned May term of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs.
HENRY H. WALKER ET AL. } In chancery.

On motion, time for Louisa M. Tillinghast and William Flannagan to pay the money ordered in the decree heretofore entered herein is extended until Monday morning next.

Afterwards, to wit, on the 3d day of July, A. D. 1875, said defendant, Emerson G. Orvis, by his solicitor, filed in said clerk's office his motion for appeal in said-entitled cause, which said motion is in the words and figures following, to wit:

Motion for appeal.

UNITED STATES OF AMERICA,
State of Illinois, ss:

In the United States circuit court for the northern district of Illinois.

NATHAN POWELL
vs.
H. H. WALKER, E. G. ORVIS, ET AL. } In chancery. No. 491.

And now comes into court the said respondent, Emerson G.
205 Orvis, by Hugh Alexander, j'r, his solicitor, and prays an appeal from the decree heretofore entered in above cause to the Supreme Court of the United States, in pursuance of the statute, &c.

Chicago, July 3d, 1875.

HUGH ALEXANDER, J'R,
Sol'r for Orvis.

(Endorsed:) Filed July 3d, 1875. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 29th day of July, A. D. 1875, in the July term of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

NATHAN POWELL
vs.
HENRY H. WALKER ET AL. } In chancery.

Now comes the defendant, Emerson G. Orvis, by his solicitor, and prays an appeal to the Supreme Court of the United States, which is allowed upon said defendant giving bond herein by the fifteenth day of August next, with security to be approved by the court, in the sum of five thousand dollars.

And afterwards, to wit, on the 14th day of August, A. D. 1875, the following order was filed in the office of the clerk of said
206 court:

STATE OF ILLINOIS, *ss:*

Ordered, that the time for filing the bond in this case be extended to the eighteenth day of August, instant.

Given under my hand at chambers, in Bloomington, August 14, 1875.

DAVID DAVIS,
Judge.

(Endorsed:) Filed August 14, 1875. W'm H. Bradley, clerk.

Afterwards, to wit, on the 16th day of August, A. D. 1875, said defendant, Orvis, filed in said clerk's office his bond in appeal in said-en-

titled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

UNITED STATES OF AMERICA,
State of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

NATHAN POWELL
vs.
HENRY H. WALKER, EMERSON G. ORVIS, ET AL. } Chancery.

Know all men by these presents that we, Emerson G. Orvis and George Taylor, of Chicago, in said district, are held and firmly
207 bound unto Nathan Powell in the full and just sum of five thousand dollars ($5,000.00), to be paid to the said Nathan Powell, his certain attorney, executor, administrator, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, by these presents, sealed with our seals and dated this sixteenth (16th) day of August, A. D. 1875.

Whereas lately, at a term of said United States circuit court for the northern district, of Illinois, in the seventh (7th) judicial circuit, in a cause depending therein between Nathan Powell, complainant, and Henry H. Walker and Emerson G. Orvis et al., respondents, heard and determined on the fifth (5th) day of June, A. D. 1875, a decree was rendered against said respondents for a foreclosure of the mortgage sought to be foreclosed by said complainant herein; from which said decree and order of sale the said Emerson G. Orvis has prayed for and obtained an appeal to the Supreme Court of the United States, to be holden at the city of Washington the second day of October next.

Now the consideration of the above obligation is such that if the said Emerson G. Orvis and George Taylor shall prosecute said appeal
208 to effect and answer all damages and costs if he fail to make said appeal good, and to secure a reversal or modification of said decree and order of sale, then the above obligation to be void, otherwise in full force and effect.

Witness our hands and seals the day and year first above written.

EMERSON G. ORNIS. [SEAL.]
GEO. TAYLOR. [SEAL.]

Signed, sealed, and delivered in the presence of—
HUGH ALEXANDER, J'r.

Approved.

H. W. BLODGETT.

(Endorsed:) Filed August 16, 1875. W'm H. Bradley, clerk.

And on the same day, to wit, the 16th day of August, A. D. 1875, the following certificate of evidence was filed in said clerk's office, in the words and figures following, to wit:

Certificate of evidence.

UNITED STATES OF AMERICA,
State of Illinois, ss:

In circuit court of the United States for the northern district of Illinois.

NATHAN POWELL
vs.
HENRY H. WALKER, EMERSON G. ORVIS, ET AL. } In chancery.

209 Be it remembered that on the 27th day of March, A. D. 1875, the master in chancery of said court filed herein his report and the testimony taken by him upon reference of above cause to him.

I certify that the following is a correct statement of the evidence and exhibits submitted to the court by such report:

On complainant's behalf was offered the mortgage and note of said Henry H. Walker to Nathan Powell, sought to be foreclosed hereby, and which is in the words and figures following, to wit:

This indenture, made this eighth (8th) day of April, in the year of our Lord one thousand eight hundred and sixty *sixty* nine (A. D. 1869), between Henry H. Walker (bachelor), of the city of Chicago, county of Cook, and State of Illinois, party of the first part, and Nathan Powell, of the city of Madison and State of Indiana, party of the second part, witnesseth, that whereas the said party of the first part is justly indebted to the said party of the second part in the sum of forty thousand five hundred ($40,500.00) dollars, secured to be paid by one certain promissory note executed by Henry H. Walker and Samuel J. Walker for said sum, bearing date March 13th, A. D. 1869, and payable to the order of the said Nathan Powell, twelve (12) months from the date thereof, with interest at the rate of ten (10) per cent. per annum, at the Second National Bank, Chicago, Illinois:

210 Now, therefore, this indenture witnesseth that the said party of the first part, for the better securing the payment of the money aforesaid with interest thereon, according to the tenor and effect of the said promissory note above mentioned, and also in consideration of the further sum of one dollar in hand paid by the said party of the second part at the delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, all the following-described lot, piece, or parcel of land situate in the county of Cook, and State of Illinois, and known and described as follows, to wit:

The northeast quarter of the southwest quarter of section number five (5), in township number thirty-eight (38) north, range fourteen (14) east, of the third principal meridian.

(One 50-cent and four 10-cent internal-revenue stamps, cancelled.)

To have and to hold the same, together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in anywise appertaining; and also all the estate, interest, and claim whatsoever in law as well as in equity which the party of the first part has in and to the premises hereby conveyed unto the said party of
211 the second part, his heirs and assigns, and to their only proper use, benefit, and behoof.

Provided, always, and these presents are upon this express condition, that if the said party of the first part, his heirs, executors, or adminis-

trators, shall well and truly pay or cause to be paid to the said party of the second part, his heirs, executors, administrators, or assigns, the aforesaid sum of money, with such interest thereon at the time and in the manner specified in the above-mentioned promissory note according to the true intent and meaning thereof, then, and in that case, these presents and everything herein expressed shall be absolutely null and void. But it is further provided and agreed that if default be made in the payment of the said promissory note, either of principal or interest, on the days whereon the same shall become due and payable, the whole of said principal and interest secured by the said promissory note in this mortgage mentioned shall thereupon, at the option of said party of the second part, become immediately due and payable; anything herein or in said promissory note contained to the contrary notwithstanding.

And this mortgage may be immediately foreclosed to pay the same by said party of the second part, his heirs, executors, administrators, or assigns; or the said party of the second part, his heirs, executors, administrators, or assigns, after publishing a notice in a newspaper printed in the city of Chicago, Cook County, Illinois, thirty (30) days before
212 the day of such sale, may sell the said premises and all right and equity of redemption of the Henry H. Walker, party of the first part, his heirs and assigns therein, at public auction, at the court-house door in said city of Chicago, to the highest bidder for cash, at the time mentioned in such notice.

And the said party of the first part hereby specially covenants and agrees to and with said party of the second part to waive his right of equity and redemption; and the said party of the second part to make, execute, and deliver to the purchaser or purchasers thereof a deed or deeds for the premises so sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, also the principal and interest due on said promissory note, and to render the overplus, if any, to said Henry H. Walker, his heirs or assigns, at the office of said party of the first part in Chicago, Illinois.

And the said party of the first part does hereby covenant and agree with the said party of the second part that at the time of delivery hereof the said party of the first part is the lawful owner of the premises above granted and seized thereof in fee-simple absolute; that he will warrant and defend the above-granted premises in the quiet and peaceable
213 possession of the said party of the second part, his heirs and assigns, forever, and they are free from all incumbrances whatsoever.

And the said Henry H. Walker, party of the first part, hereby expressly waives and releases any and all right, benefit, privilege, advantage, and exemption under or by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale on execution or otherwise, and especially under the act entitled "An act to exempt homesteads from sale on execution," passed by the general assembly of the State of Illinois A. D. 1851, and approved February 11, 1851, and an act entitled "An act to amend an act entitled 'An act to exempt homesteads from sale on execution,'" passed by said assembly A. D. 1857, and approved February 17, A. D. 1857.

In witness whereof the party of the first part hereunto set his hand and seal the day and year first above written.

HENRY H. WALKER. [SEAL.]

Signed, sealed, and delivered in the presence of—

STATE OF ILLINOIS,
City of Chicago, Cook County, ss:

I, John P. Olinger, a notary public in and for the said city in said county, in the State aforesaid, do hereby certify that Henry H. Walker, who is personally known to me to be the same person whose
214 name is subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this twenty-second day of May, A. D. 1869.

[SEAL.] JOHN P. OLINGER,
Notary Public.

No. 13083.

STATE OF ILLINOIS,
Cook County:

This instrument was filed for record on the 25 day of May, A. D. 1869, at the hour of 5 o'clock p. m., and duly recorded in book 133 of mortg's, at page 40.

NORMAN GASSETTE,
Clerk of Circuit Court and ex officio Recorder.

$40,500.00.] CHICAGO, *March 13th*, 1869.

Twelve months after date we promise to pay to the order of Nathan Powell forty thousand five hundred ($40,500) dollars, at the Second National Bank, Chicago, Illinois, for value received, with interest from the day of the date thereof until paid, at ten per centum per annum.

HENRY H. WALKER.
SAM'L J. WALKER.

Secured by mortgage deed of the date of April 8th, 1869, duly stamped.

(Endorsed:) Rec'd int. on the within note to 13 day of Sept., 1870. Rec'd on the within note 20,500 Sept. 17, '70, at Chicago. Rec'd on the within note 8,000 (eight thousand) dollars Dec. 12, '70. N. Powell. Int. paid to April 12, '71. Int. paid to 13th June, 1872. Int. paid to 1st Nov'r, 1872.

On defendant's behalf the depositions of Berthold Lowenthal, A. M. Pence, Joseph E. Smith, Henry H. Walker, Robert W. Ralston, with exhibits; Samuel J. Walker, Elias Greenebaum, Hugh Alexander, jr.; the answers of Charles L. Symonds and Daniel Pratt, as assignees in bankruptcy of the People's Safe Deposit & Savings Institution of the State of New York; memoranda of appointment of said Symonds & Pratt as such assignees, and certificate thereof by Winfield Rob-
215 bins, clerk of the district court of the United States for northern district of New York, marked "Exhibit K"; depositions of Robert Hervey and Daniel L. Boone, which are heretofore set out in this record.

216 An abstract of title to the northeast quarter of the southwest quarter of section five, township number thirty-eight north, of range fourteen and east of the 3rd P. M., in Cook County, Illinois, and which is in the words and figures following, to wit:

Nathan Powell and wife to Henry H. Walker. Doc., 13080.

Deed dated April 1, 1869, and recorded May 25, 1869, in book 537, page 87. Convey the und. ¼ of S. W. ¼ of section 5, T. 38 N., R. 14 E.

Henry H. Walker to Nathan Powell. Doc., 13083.

Mortgage, dated April 8, 1869, and recorded May 25, 1869, in book 133 of mortgages, page 40. Conveys the N. E. ¼ of S. W. ¼ of section 5, T. 38 N., R. 14 E.

Nathan Powell to Henry H. Walker. Doc., 66468.

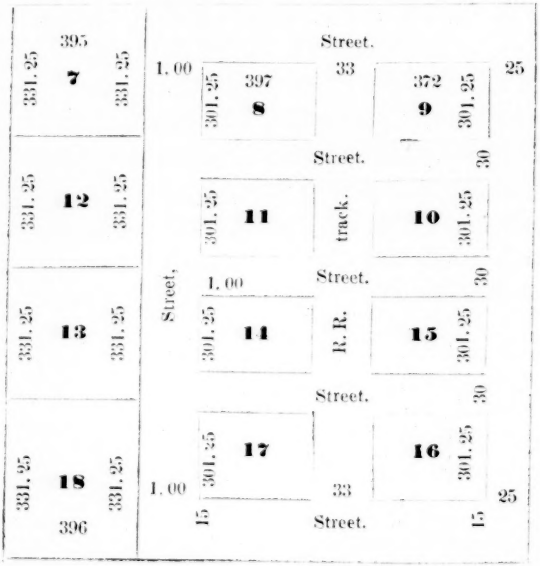
Release-deed, dated Sept. 12, 1870, and recorded Sept. 19, 1870, in book 598, page 610. Releases the N. ½ of N. E. ¼ of S. W. ¼ of section 5, T. 38 N., R. 14 E., from mortgage recorded in book 133 of mortgages, page 40.

Henry H. Walker to Sam'l J. Walker. Doc., 66466.

Quitclaim deed, dated April 12, 1870, and recorded Sept. 19, 1870, in book 574, page 428. Conveys the N. E. ¼ of S. W. ¼ of section 5, T. 38 N., R. 14 E.

Subdivision by Samuel J. Walker. Doc., 66615.

Plat entitled "Packer's subdivision of the N. E. ¼ of the S. W. ¼ of sec. 5, T. 37, R. 14." Recorded Sept. 30, 1870, in book 172 of maps, page 25, as follows:



217 *Sam'l J. Walker to W'm Flanagan. Doc.*, 159926.

Receipt, dated Feb'y 27, 1874, and recorded April 4, 1874, in book 336, page 230. For $500, on account of purchase of the north 200 feet of block 16, in Packer's addition of the northeast quarter of southwest quarter of sec. 5, T. 38, R. 14 E., in Cook County, Illinois.

Henry H. Walker (bachelor) to William Flanagan. Doc., 161903.

Warranty-deed, dated Feb'y 27, 1874, and recorded April 15, 1874, in book 305, page 628. Conveys land in Cook County, Illinois, to wit: The north 201 feet of block 16, of Packer's subdivision of the northeast quarter of the southwest quarter of sec. 5, T. 38 N., R. 14 E., of the 3rd P. M.

Samuel J. Walker and Henry H. Walker, with Emerson G. Orvis. Doc., 152810.

Agreement, dated Feb'y 26, 1874, and recorded Feb'y 26, 1874, in book 288, page 183. For conveyance, by warranty-deed, of the south 100 feet of block 16, in Packer's subdivision of the northeast quarter of the southwest quarter of sec. 5, in T. 38 N., of R. 14 E., of the 3rd P. M., in town of Lake, Cook County, Illinois.

Henry H. Walker (bachelor) to Emerson G. Orvis. Doc., 160769.

Warranty-deed, dated Feb'y 26, 1874, and recorded April 9, 1874, in book 391, page 27. Conveys land in Cook County, Illinois, to
218 wit: The south 100 feet of block 16, of Packer's subdivision of the northeast quarter of the southwest quarter of sec. 5, T. 38 N., R. 14 E., of the 3rd P. M.

Samuel J. Walker and Amanda M., his wife, to Sherman A. Ricker. Doc., 93853.

Warranty-deed, dated Feb'y 25, 1873, and recorded April 5, 1873, in book 132, page 441. Convey land in Cook County, Illinois, to wit: Block 14 of Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14 E., of the 3rd P. M.

Also, as appurtenant to the property herein conveyed, the right to use, in common with others owning property in said subdivision, any and all streets and alleys, together with the railroad street or right of way, and the railroad track laid down thereon as shown on the recorded plat of said subdivision, no exclusive rights in any street, however, being hereby conveyed or intended to be given.

Samuel J. Walker and Amanda M., his wife, to John D. Kinney. Doc., 71268.

Warranty-deed, dated Nov. 25, 1872, and recorded Dec. 2, 1872, in book 131, page 364. Convey the following-described lots of land in Cook County, Illinois, to wit: Blocks numbers 7 and 16 in Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14 E., of the 3rd P. M.

219 *John D. Kinney, of Cincinnati, to John G. Rogers. Doc.*, 132298.

Trust-deed, dated Nov. 25, 1872, and recorded Oct. 23, 1873, in book 266, page 453. Conveys premises in Cook County, Illinois, described as follows, to wit: Block number 16 in Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14 E., of the 3rd P. M.

John G. Rogers, trustee, to John D. Kinney. Doc., 162420.

Release-deed, dated April 8, 1874, and recorded April 16, 1874, in book 369, page 289. Releases the south 100 feet of block 16 of Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14 E. of the 3rd P. M., from lien of trust-deed, dated Nov. 25, 1872, and recorded in book 266, page 453.

John D. Kinney and wife to Henry H. Walker. Doc., 156092.

Quitclaim deed, dated March 6, 1874, and recorded March 16, 1874, in book 134, page 488. Convey and quitclaim block 16, in Packer's subdivision of the northeast quarter of the southwest quarter of sec. 5, T. 38 N., R. 14 E., of the 3d P. M., in Cook County, Illinois.

220 *Samuel J. Walker and wife to Patrick Brennock. Doc.*, 61359.

Warranty-deed, dated March 8, 1872, and recorded Oct. 10, 1872, in book 131, page 23. Convey block 15 in Packer's subdivision of the northeast quarter of the southwest quarter of sec. 5, T. 38 N., R. 14 E., of the 3rd P. M., in Cook County, Illinois.

Samuel J. Walker and Amanda M., his wife, to Robert W. Ralston. Doc., 54094.

Warranty-deed, dated Oct. 2, 1871, and recorded Sept. 4, 1872, in book 130, page 316. Convey block 17, in Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14 E., of the 3rd P. M., in Cook County, Illinois.

Samuel J. Walker and wife, by her attorney, to Brian Philpot. Doc., 76171

Warranty-deed, dated Sept. 10, 1870, and recorded Dec. 9, 1870, in book 606, page 548. Convey lot 13 in Packer's subdivision of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 5, T. 38, R. 14 E.

Sam'l J. Walker and wife to Henry E. Pickett. Doc., 68324.

Warranty-deed, dated Oct. 1, 1870, and recorded Oct. 5, 1870, in book 633, page 220. Convey blocks 16, 17, and 18, in Packer's subdivision of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 5, T. 38, R. 14 E.

221 *Henry E. Pickett to Bacon Wheeler. Doc.*, 68326.

Trust-deed, dated Oct. 1, 1870, and recorded Oct. 5, 1870, in book 599, page 352. Conveys block 16, in Packer's subdivision of the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 5, T. 38, R. 14 E.

Henry E. Pickett to Bacon Wheeler. Doc., 68325.

Trust-deed, dated Oct. 1, 1870, and recorded Oct. 5, 1870, in book 599, page 351. Conveys block 17, in Packer's subdivision of the N. E. ¼ of the S. W. ¼ of sec. 5, T. 38, R. 14 E.

Henry E. Pickett to Bacon Wheeler. Doc., 68327.

Trust-deed, dated Oct. 1, 1870, and recorded Oct. 5, 1870, in book 599, page 353. Conveys lot 18, in Packer's subdivision of the N. E. ¼ of the S. W. ¼ of sec. 5, T. 38, R. 14 E.

Henry E. Pickett and wife to Samuel J. Walker. Doc., 11267.

Quitclaim deed, dated Sept. 20, 1871 and recorded Sept. 28, 1871. Convey blocks 16, 17, and 18, in Packer's subdivision of the N. E. ¼ of the S. W. ¼ of section 5, T. 38, R. 14 E.

Sam'l J. Walker and wife, by her attorney, to Francis A. Hoffman. Doc., 67596.

222 Trust-deed, dated Sept. 26, 1870, and recorded Sept. 29, 1870, in book 599, page 331. Convey blocks 14 and 15, Packer's subdivision N. E. ¼ S. W. ¼ sec. 5, aforesaid.

Francis A. Hoffman, trustee, to Samuel J. Walker. Doc., 93855.

Release-deed, dated July 1, 1872, and recorded April 5, 1873, in book 249, page 317. Releases block 14, in Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14 E., of the 3rd P. M., from the trust-deed last shown.

Samuel J. Walker and Amanda M., his wife, to William F. Coolbaugh and Heman G. Powers. Doc., 72450.

Warranty deed, dated July 1, 1872, and recorded Dec. 7, 1872, in book 202, page 102. Convey blocks 7, 12, 13, 14, 16, 18, and the south 187.5 feet of block 8 of Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14 E., of the 3rd P. M. Also, as appurtenant to the property hereby conveyed, the right to use, in common with others owning property in said subdivision, any and all streets and alleys, together with the railroad street or right of way, and the railroad track laid down thereon, as shown upon the recorded plat of said subdivision.

William F. Coolbaugh and Addie R., his wife, and Heman G. Powers and Sarah E., his wife, to Samuel J. Walker. Doc., 93149.

223 Quitclaim deed, dated Feb'y 25, 1873, and recorded April 3, 1873. Convey block 14, of Packer's subdivision of the northeast ¼ of the southwest ¼ of section 5, T. 38 N., R. 14 E., of 3rd P. M., in Cook County, Illinois.

William F. Coolbaugh and Addie R., his wife, and Heman G. Powers and Sarah E., his wife, to Samuel J. Walker. Doc., 132840.

Quitclaim deed, dated Feb'y 25, 1873, and recorded Oct. 27, 1873, in book 230, page 340. Convey land in Cook County, Illinois, to wit: Block 14, of Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14 E., of the 3rd P. M.

S. A. Ricker (bachelor) to Wirt Dexter. Doc., 133775.

Trust-deed, dated Oct. 29, 1873, and recorded Nov. 1, 1873, in book 332, page 75. Conveys land in Cook County, Illinois, to wit: Block 14, in Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 15 E., of the 3rd P. M., together with all mprovements situate thereon.

Patrick Brennock and wife to John Brennock. Doc., 176369.

Warranty-deed, dated May 23, 1874, and recorded June 26, 1874.
224 Convey land in Cook County, Illinois, to wit: Lot 15, in Packer's subdivision of the northeast quarter of the southwest quarter of sec. 5, T. 38 N., R. 14 E., of 3rd P. M.

John Brenock and wife to Julius Rosenthal. Doc. 176721.

Trust-deed dated June 5, 1874, and recorded June 29, 1874. Convey land in Chicago, Cook County, Illinois, to wit: Lots 2 and 5, in block 10, in the school-section addition to Chicago; also block 15, in Packer's subdivision of the northeast quarter of the southwest quarter of sec. 5, T. 38 N., R. 14 E., of the 3rd P. M.

William F. Coolbaugh and wife and Heman G. Powers and wife to Samuel J. Walker. Doc. 161901.

Quit-claim deed dated Feb'y 25, 1874, and recorded April 15, 1874, in book 254, page 142. Convey land in Cook County, Illinois, to wit: Block 16, of Packer's subdivision of the northeast quarter of the southwest quarter of sec. 5, T. 38 N., R. 14 E., of the 3rd P. M.

Samuel J. Walker and wife to Henry H. Walker. Doc. 161902.

Quit-claim deed dated April 11, 1874, and recorded April 15, 1874, in book 134, page 546. Convey and quit-claim block 16, of Packer's subdivision of the northeast quarter of the southwest quarter of sec. 5, T. 38 N., R. 14 E., of the 3rd P. M., in Cook County, Illinois.

225 *Emerson G. Orvis to Elias Greenebaum. Doc.* 160768.

Trust-deed dated Feb'y 26, 1874, and recorded April 9, 1874, in book 78, page 450. Conveys land in Cook County, Illinois, to wit: The south 100 feet of block 16, in Packer's subdivision of the northeast quarter of the southwest quarter of sec. 5, in T. 38 N., R. 14 E., of the 3rd P. M.

Emerson G. Orvis and wife to John Somes. Doc. 167357.

Trust-deed dated April 15, 1874, and recorded May 12, 1874, in book 391, page 259. Convey land in the town of Lake, Cook County, Illinois,

to wit: The south 100 feet of block 16, in Packer's subdivision of the northeast quarter of the southwest quarter of sec. 5, T. 38 N., of R. 14 E., of the 3rd P. M.

William Flanagan to John G. Rogers. Doc. 161904.

Trust-deed dated Feb'y 27, 1874, and recorded April 15, 1874, in book 335, page 538. Conveys land in Cook County, Illinois, as follows: The north 201 feet of block 16, of Packer's subdivision of the northeast quarter of the southwest quarter of sec. 5, T. 38 N., R. 14 E., of the 3rd P. M.

Robert W. Ralston to John G. Rogers. Doc. 54104.

Trust-deed dated Oct. 2, 1871, and recorded Sept. 4, 1872, in
226 book 159, page 606. Conveys block 17, in Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14 E., of the 3rd P. M., in Cook County, Illinois.

Robert W. Ralston (bachelor) to the Northwestern Fertilizing Company, its successors or assigns. Doc. 54093.

Quit-claim deed dated Oct. 3, 1871, and recorded Sept. 4, 1872, in book 43, page 40. Conveys block 17, in Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14 E., of the 3rd P. M., said premises lying and being in Cook County, Illinois.

A stipulation of counsel for complainant and for respondents: That above abstract "offered in evidence truly represents the record of the different instruments thereby shown, so far as purports the dates of filing the same, and that the same may be used as evidence in lieu of original documents, subject, however, to contradiction by any competent evidence."

227 And as evidence of securities the stipulation between Samuel J. and Henry H. Walker, Louisa M. Tillinghast, and Robert Hervey, and which is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In circuit court of the United States for northern district of Illinois.

NATHAN POWELL *vs.* SAMUEL J. WALKER ET AL.	Bill.	Foreclosure.
SHERMAN A. RICKER *vs.* NATHAN POWELL.	Cross-bill.	

Before Henry W. Bishop, esq., master in chancery, U. S. court. In reference.

Samuel J. Walker and other parties interested, respondents in above cause, hereby agree that the master in chancery receive, to abide the

further order of the court in this cause, all the notes, bonds, and moneys alleged by said cross-bill to be in the hands of Mess. Hervey, Anthony, and Galt, attorneys at law, and owing by one William Flannigan to said Samuel J. Walker or Henry H. Walker, and in the hands of Levi J. Boone or Louisa Tillinghast, and owing to said Walkers
228 by said Tillinghast, as the same by the testimony under said cross-bill shall be proved to exist and be owing, for the express use and purpose of applying the same to pay and remove the lien of said Nathan Powell upon the property mortgaged to him as set out in said original bill, and the said securities, or so much thereof as may be necessary to pay said Powell lien and decree, to be marshalled and disposed of under the order of said court for the use and purposes before named.

Chicago, March 9th, 1875.

SAM'L J. WALKER,
ROB'T HERVEY,
For W'M FLANAGAN,
LOUISA M. TILLINGHAST.
H. H. WALKER.

(Endorsed:) Filed May 12, 1875. W'm H. Bradley, cl'k.

Correct.

J. MULVEY,
HUGH ALEXANDER, J'R.,
Sol's for Orvis.

Approved.

H. W. BLODGETT.

(Endorsed:) Filed Aug. 16, '75. W'm H. Bradley, cl'k.

229 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Nathan Powell is the complainant and Henry H. Walker et al. are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 6th day of October, A. D. 1875, and of our Independence the 100th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 288. Emerson G. Orvis, appellant, vs. Nathan Powell. N. Illinois C. C. U. S. Filed 23rd October, 1875.

SUPREME COURT OF THE UNITED STATES.

EMERSON G. ORVIS,
Appellant,
v.
NATHAN POWELL.

No. 288.

BRIEF FOR SHERMAN A. RICKER,

One of the Defendants Below

and for Appellant Orvis.

MELVILLE W. FULLER,
Of Counsel.

CHICAGO:
CHICAGO LEGAL NEWS CO., PRINTERS, 151 & 153 Fifth Ave.
1878.

SUPREME COURT OF THE UNITED STATES.

EMERSON G. ORVIS,
Appellant,
vs.
NATHAN POWELL,
Appellee.
No. 288.

BRIEF FOR SHERMAN A. RICKER,
ONE OF THE DEFENDANTS BELOW.

MAY IT PLEASE YOUR HONORS:

This was a bill in equity, exhibited by Nathan Powell, the appellee, against E. G. Orvis, the appellant, Sherman A. Ricker and many others, to foreclose a mortgage upon certain real estate which had been sold in parcels, subsequent to the execution and record of the instrument.

The question at issue on this appeal involves the application of the rule as to sales upon foreclosure in the inverse order of the alienation, and the decree of the Court below is complained of as erroneous in the order

thereby determined, in which the several parcels are directed to be disposed of. It is believed that the error as to that portion owned by my immediate client, Mr. Ricker, can be easily demonstrated, and so also in relation to that of the appellant, Orvis, between whom and Ricker, there does not seem any room for dispute.

Under the practice in the Supreme Court of Illinois, from one of the districts of which State this case comes to this Court, there is no necessity of assigning cross-errors in a suit in chancery. The entire record is considered before the Court for the entry of, or the direction to the court below to enter, such decree as shall be found to be demanded.

Carter v. *Moses*, 40 Illinois, 55.

I shall assume, therefore, that I am entitled to submit this brief on Mr. Ricker's behalf, and to assign errors herein, for him, notwithstanding the appeal is prosecuted by Mr. Orvis.

Should I be mistaken in this, however, it is perhaps not material, as I shall necessarily point out what I conceive to be errors in the record, so far as appellant, Orvis, is concerned.

The errors apparent upon the face of the record are manifestly the result of some misapprehension, for there seems to be no controversy as to the facts, and probably none as to the law.

The cause is to be determined chiefly upon an abstract of title, stipulated to be used in evidence in lieu of the original documents, and lies in a very small compass.

STATEMENT OF FACTS.

The bill was filed July 23d, 1874, by Nathan Powell against Henry H. Walker and others, for the foreclosure of a mortgage.

April 1, 1869, Nathan Powell conveyed by special warranty deed, to Henry H. Walker, the *undivided* ¼ of

S.W. ¼ of Sec. 5, T. 38, N. R. 14 E., recorded May 25, 1869.

April 8th, 1869, Henry H. Walker gave the mortgage in question to Nathan Powell, complainant below, upon the northeast one-fourth of the southwest one-fourth of section 5, township thirty-eight, N. R. 14 E., which mortgage was recorded May 25, 1869. (P. rec. p. 94.)

April 12, 1870, H. H. Walker conveyed the same premises to Samuel J. Walker by quit claim, recorded Sept. 19, 1870. (P. rec. 94.)

Sept. 12, 1870, Nathan Powell released to Henry H. Walker the north half of the northeast one-fourth of southwest one-fourth, &c., from the mortgage. This release was recorded Sept. 19, 1870. (P. rec. p. 94.)

Sept. 30th, 1870, a plat entitled "Packer's subdivision of the N. E. ¼ of the S. W. ¼ of sec. 5, &c.," was recorded. It is to be found on page 94 of the printed record, and is entitled as made by Samuel J. Walker.

As shown by this plat, blocks 13, 14, 15, 16, 17 and 18, of the south half of the subdivision appear to be subject to the Powell mortgage, the other blocks, 7, 8, 9, 10, 11, and 12, being in the portion released therefrom as above stated.

Taking each block by itself, the conveyances appear as follows:

Block 13:

S. J. Walker and wife to Brian Philpot; warranty deed of *lot* 13, in Packer's subdivision; dated Sept. 10th, 1870, and *recorded* Dec. 9, 1870.

(Printed record, p. 96.)

Brian Philpot to John G. Rogers, trustee; trust deed, dated Sept. 10th, 1870, and recorded Oct. 3d, 1870.

(Printed record, pp. 58, 59—evidence of Loewenthal.)

Samuel J. Walker and wife to W. F. Coolbaugh and H G. Powers; warranty deed, dated July 1, 1872, and

recorded Dec. 7, 1872. This deed conveys other blocks, as well as Block 13. (P. rec. p. 97.)

Evidence aliunde that Coolbaugh and Powers originally purchased the blocks described in the deed to them, but the sale was rescinded, and they held the title for whatever was due Mr. Coolbaugh or the bank.

Coolbaugh and Powers held, therefore, as *mortgagees* only.

(See evidence of S. J. Walker, at bottom of page 65, and top of page 66 of the printed record.)

Block 14.

S. J. Walker and wife to F. A. Hoffman; trust deed; dated September 26, 1870, and *recorded* Sept. 29, 1870; conveyed blocks 14 and 15.

Hoffman to Walker: release of the foregoing deed, as to block 14; dated July 1, 1872; recorded April 5, 1873. (P. rec. p. 97.)

S. J. Walker and wife to W. F. Coolbaugh and H. G. Powers, of block 14, as well as blocks 7, 12, 13, 16, 18, and the north 187 25-100 feet of block 8 of Packer's subdivision.

Deed dated July 1, 1872; recorded Dec. 7, 1872. (P rec. P. 97.)

Evidence that Coolbaugh and Powers held as mortgagees only as above stated in relation to block 13. See evidence at bottom of page 65 and top of page 66, of printed record.

S. J. Walker and wife to *Sherman A. Ricker:* warranty deed; dated Feb. 25, 1873, and *recorded* April 5, 1873; Block 14 of Packer's subdivision. (P. rec. p. 95.)

Coolbaugh and wife and Powers and wife to Samuel J. Walker; quit claim of block 14; dated Feb. 25, 1873, and *recorded* April 3, 1873. (Prin. Rec., p. 97.)

Block 15.

Samuel J. Walker and wife to Patriek Brennock;

warranty deed: dated March 8, 1872, and *recorded* Oct. 10th, 1872. (P. rec., p. 96.)

Patrick Brennock to John Brennock; warranty deed; dated May 23, 1874; *recorded* June 26, 1874. (P. rec., p. 98.)

John Brennock to Julius Rosenthal; trust deed; dated June 5, 1874, and *recorded* June 29, 1874. (P. rec., p. 98.)

Block 16.

Samuel J. Walker and wife to Henry E. Pickett; warranty deed of blocks 16, 17, 18; dated Oct. 1, 1870, and *recorded* Oct. 5, 1870. (P. rec., p. 96.)

Henry E. Pickett to Bacon Wheeler; trust deed, conveying block 16, dated Oct. 1, 1870, and *recorded* Oct. 5, 1870. (P. rec., p. 96.)

Evidence of S. J. Walker (P. rec., p. 63), Elias Greenebaum (P. rec., p. 70), Robert Hervey (P. rec., p. 79), establishes that the note this trust deed was given to secure had been paid, but the release never obtained.

Henry E. Pickett and wife to Samuel J. Walker; quit claim deed of blocks 16, 17 and 18; dated Sept. 20, 1871, and *recorded* Sept. 28, 1871. (P. rec. p. 97.)

Samuel J. Walker and wife to W. F. Coolbaugh and H. G. Powers; warranty deed; dated July 1, 1872, and *recorded* Dec. 7, 1872, conveying blocks 16, 7, 12, 13, 14, 18 and the south 187 25-100 feet of block 8. (P. rec. p. 97.)

Samuel J. Walker and wife to John D. Kinney; warranty deed; dated Nov. 25, 1872, and *recorded* Dec. 2, 1872. (P. rec. p. 95.)

John D. Kinney to John G. Rogers, trustee; trust deed of block 16; dated November 25, 1872, and *recorded* Oct. 23, 1873. (P. rec. p. 96.)

John G. Rogers, trustee, to John D. Kinney; releases *south* 100 *feet* of block 16; dated April 8, 1874, and *recorded* April 16, 1874. (P. rec. p. 96.)

John D. Kinney and wife to H. H. Walker; quit claim of block 16; dated March 6, 1874, and *recorded* March 16, 1874. (P. rec. p. 96.)

W. F. Coolbaugh and wife and H. G. Powers and wife to Samuel J. Walker; quit claim of block 16; dated Feb. 25, 1874; *recorded* April 15, 1874. (P. rec. p. 98.)

Samuel J. Walker and wife to Henry H. Walker; quit claim of said block; dated April 11, 1874, and *recorded* April 15, 1874. (P. rec. p. 98.)

S. J. Walker and Henry H. Walker, with E. G. Orvis; agreement dated and recorded Feb. 26, 1874, for conveyance by warranty deed of the south 100 feet of block 16. (P. rec., p. 95.)

H. H. Walker to Orvis; warranty deed of said south 100 feet; dated Feb. 26, 1874; *recorded* April 9, 1874. (P. rec., p. 95.)

Samuel J. Walker to William Flanagan; receipt, dated Feb. 27, 1874, *recorded* April 4, 1874, of $500 on account of north 200 feet of block 16. (P. rec., p. 95.)

H. H. Walker to Wm. Flanagan; warranty deed of north 201 feet of block 16; dated Feb. 27, 1874; recorded April 15, 1874. (P. rec., p. 95.)

E. G. Orvis and wife to E. Greenebaum; trust deed; dated Feb. 26, 1874, and recorded April 9, 1874, of south 100 feet of block 16. (P. rec., p. 98.)

E. G. Orvis and wife to John Somes; trust deed; dated April 15, 1874, and recorded May 12, 1874; conveying south 100 feet of block 16. (P. rec., p. 98.)

W. Flanagan to J. G. Rogers; trust deed of north 201 feet of block 16; dated Feb. 27, 1874, and recorded April 15, 1874. (P. rec., p. 99.)

Block 17.

Samuel J. Walker and wife to H. E. Pickett; warrantee deed of block 17; dated Oct. 1, 1870, and recorded Oct. 5, 1870.

H. E. Pickett to Bacon Wheeler; trust deed, convey-

ing block 17: dated Oct. 1, 1870, and recorded Oct. 5, 1870.

H. E. Pickett and wife to S. J. Walker; quit-claim of block 17, dated Sept. 20, 1871, and *recorded* Sept. 28, 1871.

Samuel J. Walker and wife to R. W. Ralston; warranty deed of block 17; dated Oct. 2, 1871, and recorded Sept. 4, 1872.

R. W. Ralston to J. G. Rogers; trust deed; dated Oct. 2, 1871, and recorded Sept. 4, 1872.

R. W. Ralston to N.West. Fertilizing Company: quit-claim; dated Oct. 3, 1871, and recorded Sept. 4, 1872.

Block 18.

Samuel J. Walker and wife to W. F. Coolbaugh and H. G. Powers; warranty deed of block 18; dated July 1, 1872, *recorded* Dec, 7, 1872. (P. rec. p. 97.)

Evidence on pp. 65 and 66, as before stated, that Coolbaugh and Powers held by way of mortgage only.

Contract between W. F. Coolbaugh, H. G. Powers, S. J. Walker and Louisa M. Tillinghast, dated Sept. 3, 1874, but never recorded, for the conveyance by Coolbaugh and Powers by quit-claim, of south ½ of block 18, the agreement reciting that S. J.Walker had previously contracted with Mr. Tillinghast, Feb. 9, 1874, to give warrantee deed. (P. rec. p. 81.)

Evidence that Tillinghast entered into possession of said south half, and made valuable improvements, erecting what is known as a "killing house," &c., but died the latter part of April, 1874. (P. record p. 80.)

The cause having been referred to the Master, to take proof and report the same to the Court (P. Rec., p. 42), he reported on the 17th of March, 1875, not only the evidence, but his conclusion that the property should be sold in a certain order.

As the report appears on page 57 of the printed record, the order of sale which he recommended is as follows:

1. The north 201 feet of block 16.
2. The south 100 feet of block 16.
3. Block 14.
4. Blocks 13 and 18.
5. Block 15.

And he further reports that there was a contract with Mrs. Tillinghast, dated Sept. 3, 1874, for the sale of the south half of block 18, and that it would appear, *if that contract had been duly recorded*, that said south half of 18 was first liable to be sold.

It is evident that this report as originally made, recommended the sale of block 14 *first*, as on the 5th day of April, 1875, the defendant, Sherman A. Ricker, filed his *exceptions* to said report, which will be found upon page 83 of the printed record, and are as follows:

"*First:* Said report finds that block fourteen (14) Packer's subdivision, &c., owned by said Sherman A. Ricker, is first liable to sale under said mortgage, whereas it should find that said lot is not first liable.

"*Second*: Said report does not find that block sixteen (16) is liable to sale before block fourteen (14), whereas it should find that said block sixteen (16) is so liable to sale before said block fourteen (14).

"*Third:* Said report does not find that the (north) 201 feet of block sixteen (16) is liable to sale before said block fourteen (14), whereas it should so find.

"*Fourth:* Said report does not find that the (south) 100 feet of said block sixteen (16) is liable to sale before said block fourteen (14), whereas it should so find.

"*Fifth:* Said report does not find that the south half (S. ½) of block eighteen (18) in said Packer's subdivision, should be first sold under said foreclosure proceedings, whereas it should so find.

"*Sixth:* Said report does not (in terms) find that the securities in the hands of Robert Hervey, Esq., are liable to sale before any portion of the mortgaged premises can be sold, whereas it should so find."

These exceptions were heard upon the 12th day of May, A. D. 1875, and upon the 15th of May, the Court entered its order sustaining "said exceptions so far as they relate to block fourteen therein mentioned, which was by said Master found to be first liable to sale under this proceeding; and it is therefore ordered that said report be reformed by providing that block sixteen (16) shall first be sold in the way mentioned in said report, and after that block fourteen (14), and that *then* the order of sale as indicated in said report, shall be followed." (P. rec., p. 85.)

It is apparent that the report was thereupon amended to conform with this order, by making the amendments on the original report, and this explains the fact that the exceptions are directed against what no longer appears.

On the 5th day of June, 1875, the decree was entered, a decree *not in accordance* with the order of May 15th, as will be seen.

The Court decrees that the property be sold in the following order:

1. The north 201 feet of block 16, *excepting* and *reserving* the estate and interest of John G. Rogers, trustee, and Greenebaum and Foreman, *cestuis que trust.*
2. The south 100 feet of block sixteen.
3. Block fourteen.
4. The interest of Rogers and Greenebaum and Foreman in and to north 201 feet of block sixteen, heretofore excepted.
5. Blocks thirteen and eighteen.
6. Block fifteen.
7. Block seventeen.

(P. Rec., p. 87.)

That Louisa M. Tillinghast pay into Court $12,660.07, due as purchase money for the south ½ of block 18, and that Flanagan pay in $11,843.33, due as purchase money, on the north 201 feet of block 16, to be distributed by

the Court, failing in which the property be sold in the order above directed.

(P. Rec., pp. 87, 88.)

The principal questions to be determined are:

1. Whether the rule to sell in the inverse order of the alienation is applicable upon the facts of the case at bar.

2. Whether, if applicable, the rule has been properly applied in the order of sale prescribed by the decree.

3. And whether the decree is not so erroneous in reference to the right of redemption as to require correction.

ASSIGNMENT OF ERRORS.

I.

The Court erred in the entry of the decree in question, in this, to wit: in decreeing that Block 18 *should be sold as the fifth parcel in order, when the Court should have decreed that the interest of S. J. Walker in the north half of Block* 18 *should be first sold, and then his interest in the south half of said block.*

II.

The Court erred in decreeing that the north 201 *feet of block sixteen should be sold, with the reservation therefrom of the estate and interest of Rogers, Greenebaum & Foreman, and that block* 14 *should be sold before the estate, &c., of Rogers, Greenebaum & Foreman, in block* 16.

III.

The Court erred in not decreeing that the order of sale should be as follows:

1. *The north* $\frac{1}{2}$ *of block* 18, *reserving the interest of Bacon Wheeler, and Messrs. Coalbaugh and Powers therein.*
2. *The south* $\frac{1}{2}$ *of block* 18, *reserving the interest of Bacon Wheeler, and Messrs. Coalbaugh and Powers therein.*
3. *The north* 201 *feet of block* 16.
4. *The south* 100 *feet of block* 16.
5. *Block fourteen.*

6. *Block thirteen.*
7. *Block fifteen.*
8. *Block seventeen.*

IV.

The Court erred in overruling the fifth exception to the report of the Master.

V.

The Court erred in decreeing that Louisa M. Tillinghast should pay into Court the sum of $12,660.07 *as purchase money of the south half of block* 18, *and that William Flanagan should so pay in the sum of* $11,843.33, *and in failure thereof, that if the decree in Powell's favor remained unpaid, the property should be sold in the order prescribed by said decree.*

VI.

The Court erred in decreeing a sale absolute, and without reserving the statutory right of redemption.

ARGUMENT.

I.

It is the settled law in Illinois, that if a mortgagor conveys a portion of the mortgaged premises, retaining a portion himself, as between the mortgagor and his grantee, that portion retained by the mortgagor must be first applied to the payment of the mortgage. That a subsequent purchaser of the portion thus retained by the mortgagor, with notice of the prior sale of the other portion, simply steps into the shoes of the mortgagor, and will hold his portion subject to be charged primarily with the payment of the mortgage.

So, when a mortgagor makes successive sales of distinct parcels of the mortgaged property to different persons, having notice of the prior sales, and the mortgagee afterwards files a bill to foreclose, the different parcels

are to be subjected to the payment of the mortgage, *in the inverse order of their alienation.*

Iglehart v. *Crane et al.*, 42 Ill., 261.

Henry H. Walker, after giving the mortgage to Powell, quitclaimed to Samuel J. Walker, who subdivided and sold in parcels. S. J. Walker testifies, also (P. rec. p. 70), that he really made the original purchase, and assumed, in fact, to pay the Powell mortgage when Henry conveyed.

The inquiry is confined in the first instance, then, to ascertaining the order of the alienation so far as the claimants of the several pieces of real estate in question, or of interests therein, are concerned.

The only exceptions to the Master's report were filed by Sherman A. Ricker, and one of the errors assigned, questions the action of the Court thereon.

But in fact no exceptions were needed, as the cause was never referred to the Master to report upon the order in which the different parcels of the property should be sold, but the only reference was *to take the evidence and report the same to the Court.* See order p. 42 of printed record, referring cause to Master "to take proofs herein and to report the same to the Court." This order was entered Nov. 5, 1874, and is referred to by the Master in his report, page 55, and he therein states the reference in the same terms.

Ordinarily the report of a Master is like the verdict of a jury—a finding of facts—but, as in the case at bar, the order of sale to be directed in the decree, depended upon the application of rules of law to the facts found, it is easy to see that no exceptions to the report would be required as a pre-requisite to the consideration of error in the decree.

It is true that decrees frequently direct the Master to inquire and ascertain in what order the different parcels of mortgaged premises should be sold, and where this is

the case, the Master acts, in determining the question *quasi* a judge of the Court: *Snyder* v. *Stafford*, 11 Paige, 71; but no such power could be claimed for him in this instance, as the order of reference is simply to take and report the evidence.

And were this otherwise, still no exceptions to the report need be filed, since the rule is, that where the Master states all the facts correctly, but *is mistaken as to the legal consequences* of those facts, it is not necessary for the party dissatisfied with the Master's finding, to except to the report, as the question decided by the Master may be opened upon further directions without exceptions. 2 *Daniel. Ch. Pr.* (*4th ed.*), 1,310. So also a report which is objectionable on its face, may be objected to at the hearing, although no objection had previously been taken.

White v. *Johnson*, 2 Munf., 285.

And such is the rule in Illinois, it being held that "when the report on its face shows that it is based on a wrong principle, is erroneous, a neglect to do so (object to it) does not preclude them from having the report, and the decree rendered upon it, reviewed in an appellate court, any more than would a default preclude them in a decree *pro confesso*. * * When it appears from the record that an improper decree has been rendered, it will be reversed, although objections may not have been interposed on the coming in of the Master's report."

Strang v. *Allen*, 44 Ill., 428, p. 434.

In the case at bar, the Master had no authority to determine the order in which the parcels should be sold. He nevertheless reported thereon. The Court, on the 15th day of May, A. D. 1875, ordered the report to be reformed and the order of sale, as so amended, to be followed (P. rec. p. 85), and then on the 5th day of June, 1875 (P. rec. p. 87), the Court entered a final decree, differing from the report as originally made, and as reformed in accord-

ance with the order of Court, by injecting into the order for selling the north 201 feet of block 16 first, the exception of the Rogers, Greenebaum, Foreman interest, and then providing for the sale of that interest as fourth in order, this interest not having been mentioned at all in the order reported originally, nor in the order as designated in the amended report.

Clearly such action, if erroneous, could only be reviewed with reference to the decree, since no exception to the report could have presented an objection to it which did not exist, and appears for the first time in the decree.

II.

First point. The Court erred in decreeing that block 18 should be sold fifth in order, when the decree should have provided for selling the north half of said block first, and the south half second in order, reserving the mortgagees' interest therein.

Block 18 was conveyed by warranty deed, by Samuel J. Walker to Messrs. Coolbaugh and Powers, July 1, 1872, and the deed recorded Dec. 7, 1872. (P. rec., p. 97.)

It was subject to the trust deed of Pickett to Bacon Wheeler. (P. rec., p. 97.)

The evidence of S. J. Walker, to be found on pp. 65 and 66 of the printed record, establishes that the conveyance to Messrs. Coolbaugh and Powers was made in pursuance of an agreement for the sale of the blocks therein mentioned, including block 18; that this sale was rescinded, and the title was left in Coolbaugh and Powers *as security* for any balance which might be found due to Mr. Coolbaugh or the bank. How much that might be, does not appear. Walker testifies that he does not recollect, but that it would be more than enough to cover any margin over and above the encumbrances. (P. rec., p. 66.) But there were no encumbrances except the Bacon

Wheeler trust deed and the Powell mortgage, so that Walker's testimony presupposes that the block was valuable enough to pay off both these encumbrances and Coolbaugh and Powers' besides, thereby liberating all the other blocks from the mortgage foreclosed by this decree.

And the Tillinghast agreement (p. rec., p. 81) heightens the probability that it was worth much more.

This question of value is, however, immaterial. It is enough that *at the time of the decree*, this block belonged to Samuel J. Walker, subject to the rights of the mortgagees, Coolbaugh and Powers, Bacon Wheeler and Powell. This does not appear to be the fact as to any or either of the other parcels.

Hence, this equity was first to be sold, and it should have been so ordered. The question of its value could be safely left to regulate itself, the numerous purchasers of parts of the whole property, all being to a greater or less degree interested in a good price being obtained, so that their own might escape sale. And it was *the right* of each of them to insist that the equity should be first sold.

Each was entitled to require that so much of the value of the land as is not needed to satisfy the antecedent liens, be appropriated to his use, and this right being valid as against S. J. Walker, cannot be defeated by proof as to the probabilities of what the surplus might be.

But the south half of block 18 had been sold to Mrs. Tillinghast in February, 1874—and contracted to her after Mr. Tillinghast's death, by agreement, dated Sept. 3, 1874, and executed by Mr. Coolbaugh, Mr. Powers and S. J. Walker. (P. rec., p. 81.)

From this agreement it appears that Tillinghast (who died in April, 1874, see evidence, p. 80) had entered into a contract for the purchase of this half of S. J. Walker, for Mrs. Tillinghast, which contract was dated Feb. 9, 1874.

That it was therein provided that $1,000 should be paid down, $5,934 on Walker furnishing satisfactory abstract of title, and giving warranty, and Mrs. Tillinghast to give her note, dated Feb. 9, 1874, for $10,000. The total consideration is named as $11,593.41 (p. 81), or $11,943.41 (p. 80), though it apparently figures up $16,934. The agreement then provides: "And whereas, it now appears from the records that there are incumbrances on said lots; that *mortgages* or *trust deeds*, or *both*, the amount of which incumbrances cannot at present be *definitely* determined. And whereas, the said parties of the first part are desirous to carry out in good faith the agreement above substantially set forth, so far as it is in their power so to do; therefore it is understood and agreed by the parties to these presents, that upon the payment by the said Louisa M. Tillinghast, her heirs or assigns, of a *pro rata portion of any indebtedness hereafter to be determined by legal decision*, or otherwise, for which such lots may be liable, any part of which such other parties may be jointly holden for such indebtedness, and the payment of the balance of said purchase money, *if any there may be remaining* of above money, (to) W. F. Coolbaugh (and) Heman G. Powers, they will execute and deliver to the said Louisa M. Tillinghast, her heirs and assigns, a good and sufficient deed of conveyance by quit-claim, all and singular the above described premises."

Here is a clear recognition, by Messrs. Coolbaugh and Powers, of the mortgage to Powell and the trust deed to Wheeler (the *only* mortgage and the *only* trust deed outstanding,) as resting upon this block, and an agreement to convey upon Mrs. Tillinghast paying her purchase money upon the outstanding indebtedness. It is described as the "pro rata portion," for which said lot is liable; but it is contemplated that it may take the entire amount Mrs. T. is to pay.

This agreement was executed *after the bill was filed*, but the contract of sale was made with Walker before.

It appears in evidence (p. 80), that Tillinghast took possession and built a killing house, etc., on this south half, and these improvements are stated in the agreement of September 3, to have cost eight or nine thousand dollars.

The decree provides that Mrs. Tillinghast shall pay into Court, for distribution as the Court may decide, the sum of $12,660.07, being nearly enough to satisfy the Powell mortgage. (Amount of latter, as decreed, $14,853.33.)

If she does not (and Flanagan also), or if from any cause money enough is not realized to liquidate the amount due Powell, and if H. H. Walker or some other defendant does not pay the amount, then the property is to be sold as before directed; that is, block 18 is to be sold *fifth*, whereby, since the preceding parcels would pay the decree, the Tillinghast money or the property is to be reserved to be divided between Bacon Wheeler, Coolbaugh and Powers and *S. J. Walker*, and the north half is also preserved from sale for their benefit. The result of which which would be that Wheeler would certainly get the $7,500 secured by his trust deed out of the Tillinghast half alone, and Walker would reap the benefit of the difference in money or value of that half, and get the other half clean, less the amount for which Messrs. Coolbaugh and Powers held the block, which is evidently small, or they would not have executed the agreement on Sept. 3. This would be also in the teeth of that agreement which provides *in terms*, as we have seen, for the payment of at least a pro rata proportion of the Powell mortgage and the Wheeler trust deed, and in effect consents to the application of the entire $12,660.07 upon the two incumbrances to Powell and Wheeler.

It is clear that the decree should have directed the sale of the equity in the north half of block 18, first, and in

the south half, second, and it is fairly to be inferred from the evidence that the result of this order would have been the extinguishment of both trust deed and mortgage, and a surplus for Messrs. Coolbaugh and Powers, or Walker, if they were otherwise satisfied.

Of the right of Orvis and Ricker to insist upon such order, there seems no reasonable doubt.

III.

SECOND POINT: *The Court erred in decreeing that the north 201 feet of block sixteen should be sold, with the reservation therefrom of the estate and interest of Rogers, Greenebaum & Foreman, and that block fourteen should be sold before the estate, etc., of Rogers, Greenebaum & Foreman, in block sixteen.*

We have already seen that block eighteen should be sold first; and as it seems to be conceded that blocks 13, 15 and 17 were so conveyed as to be liable after blocks 16 and 14, if the inverse order of the alienation is to be followed, we address ourselves, under this point, to the examination of the *status* of the latter blocks only.

July 1, 1872, S. J. Walker conveyed blocks 14 and 16 to Coolbaugh and Powers, by warranty deed, bearing that date, but which was *recorded* Dec. 7, 1872. (P. rec., p. 97.)

Feb. 23, 1873, Coolbaugh & Powers quit-claimed said block to S. J. Walker, by deed bearing that date, and *recorded April* 3, 1873. (P. rec., p. 47.)

Feb. 25, 1873, S. J. Walker conveyed the same block (14), to Sherman A. Ricker, by warranty deed bearing that date, and *recorded April* 5, 1873. (P. rec., p. 95.)

Nov. 25, 1872, S. J. Walker conveyed block 16 to J. D. Kinney, by warranty deed of that date; *recorded* Dec. 2, 1872. (P. rec., p. 95.)

Nov. 25, 1872, J. D. Kinney gave a trust deed on said block 16 to John G. Rogers, bearing that date, but which was not *recorded* until Oct. 23, 1873. (P. rec. p. 96.)

Feb. 25, 1874, Coolbaugh & Powers conveyed to S. J. Walker, by quit-claim, said block 16, deed recorded April 15, 1874. (P. rec., p. 98.)

March 6, 1874, John D. Kinney conveyed block 16 to Henry H. Walker, by quit claim, *recorded* March 16, 1874. (P. rec. p. 96.)

April 8, 1874, John G. Rogers released to John D. Kinney, the south 100 feet of said block 16; deed dated April 8, 1874, and recorded April 16, 1874. (P. rec. p. 16.)

April 11, 1874, S. J. Walker conveyed said block 16 to Henry H. Walker, by quit claim, dated April 11, 1874, and recorded April 15, 1874. (P. rec. p. 98.)

February 26, 1874, H. H. Walker conveyed to *Emerson G. Orvis*, by warranty deed, bearing that date and *recorded* April 15, 1874, the south 100 feet of said block 16. (P. rec. p. 95.)

February 27, 1874, H. H. Walker conveyed to William Flannagan, the north 201 feet of said block 16, by warranty deed, bearing that date and *recorded* April 15, 1874. (P. rec. p. 95.)

[The south 100 and the north 201, make the whole of block 16. The Bacon Wheeler trust deed is not alluded to here because the note secured by it is proven to have been paid.]

It thus appears that Henry H. Walker, the mortgagor, had become reinvested with the title to block 16, in the spring of 1874, and had sold and conveyed to Flannagan & Orvis, before the bill in this case was filed.

But Sherman A. Ricker obtained title to block 14, February, 1873, so that, as between his block and block 16, block 16 should have been decreed to be sold first.

But it is said that when Kinney reconveyed to H. H. Walker, he left outstanding the trust deed to John G. Rogers, who holds as trustee for the benefit of Greenebaum and Foreman; and while it is conceded that block

16 should first be sold, it is insisted that the Rogers interest in 201 feet thereof—the south 100 having been released—should not be sold until *after* block 14, and so the Court decreed.

But this is clearly erroneous, because the trust deed of Kinney to Rogers was not *recorded* until *October* 23, 1873, and hence Ricker, whose conveyances were *recorded in April*, 1873, can claim and is entitled to priority, and the Rogers' interest must be sold before block 14.

So far as *the dates* of the transactions are concerned, Ricker occupies still higher ground, for the deed to Coolbaugh and Powers was executed July 1, 1872, while that to Kinney was not until Nov. 25, 1872, and it is only an accident that the Coolbaugh and Powers' conveyance was recorded Dec. 7, 1872, while that to Kinney was recorded Dec. 2, 1872, that would entitle any claimant under Kinney to contend that block 14 should be sold before block 16, and as the title to block 16 long afterwards went back to Walker, and so to Flannagan and Orvis, it is clear that it cannot be insisted, on behalf of Rogers, that his interest under a conveyance recorded months after Ricker obtained record title, can take precedence of the latter.

I regard this question as beyond controversy, and as by the decree block 14 is ordered sold before this Roger's interest, the decree is erroneous, and ought to be reversed in that particular.

But the decree is erroneous, so far as appellant Orvis is concerned, in that it directs the sale of the north 201 feet, *reserving* therefrom the Roger's interest. Or rather, inasmuch as the trust deed to Rogers is, in fact, only a qualified alienation, the interest of the mortgagor should be sold separately, so that the order should be, first the 201 feet *with* the reservation, and second, the estate and interest so reserved. The assignment of error may be treated as corrected in that particular.

When Orvis purchased the south 100 feet of block 16, he secured under his conveyance all the estate and interest of Walker, Coolbaugh and Powers and Kinney therein, and also obtained the release of the trust deed to Rogers.

As between this 100 feet and the north 201 feet of block 16, Orvis is entitled to have the latter sold first, because the conveyance to him was executed and recorded before the deed to Flannagan was given and recorded, and he is entitled, inasmuch as he also obtained a release from the Rogers' trust deed, to insist that not only the mortgagor's interest but the interest of Rogers should be sold before the 100 feet, or otherwise he is in effect subjected to the lien of that trust deed, notwithstanding it has already been released as to him.

IV.

THIRD POINT: *The order of sale should have been decreed as follows, and the court erred in not so decreeing:*

1. The north ½ of block 18, reserving the interest of Bacon Wheeler and Coolbaugh and Powers therein;
2. The south ½ of block 18, with like reservation;
3. The north 201 feet of block 16, reserving the interest of Rogers therein;
4. The interest of Rogers in said north 201 feet;
5. The south 100 feet of block 16.
6. Block 14.

And blocks 13, 15 and 17, as stated.

In any event the Rogers' interest must be sold before block 14.

V.

FOURTH POINT.—*The Court erred in overruling the fifth exception to the Master's report.* (Page 84, P. rec.)

This exception relates to the south ½ of block 18. I have already pointed out that this should be sold before

any part of block 16. I do not, however, regard exceptions to the Master's report as at all material, because the cause was not referred to him to make any report in relation to the order of sale.

And, further, where manifest error in a decree has intervened, it will be corrected without regard to the technical accuracy of the preceding proceedings.

VI.

FIFTH POINT.—*The Court erred in directing the Tillinghast and Flannagan money to be paid in, and, in failure thereof, a sale in the order directed.*

The order of sale directed was itself wrong, irrespective of the payment or non-payment by Mrs. Tillinghast and Flannagan.

If they, or either of them had paid in, it does not appear that title would have been thereby acquired, unless by agreement of parties.

It is fairly to be inferred, however, that if the order of sale had been directed as contended for in the foregoing pages, the result would have been the satisfaction of the complainant's mortgage before the 100 feet of appellant Orvis, and therefore before block 14, belonging to Ricker, were reached upon the sale.

VII.

SIXTH POINT: *The Court erred in decreeing a sale absolute, and without reserving the statutory redemption.*

Strict foreclosures are allowed in Illinois, upon allegations and proof of the insolvency of the mortgagor and inadequacy of the security, and where mortgagee is willing to take the property and discharge the debt.

But they are held not to be proper where there are other incumbrances or creditors, or purchasers of the equity of redemption.

Farrell v. *Parlier*, 50 Ill., 274.

The bill in this case is not one for a strict foreclosure. It lacks the proper averments, although it is alleged that the security is scanty, and as to the proofs there is no evidence upon which a decree of strict foreclosure, as such, could be founded. On the contrary, the record is full of proof that the property is worth many times the amount due. The bill sought a sale, and this is what is awarded by the decree.

It is provided, that if the amount found due upon the mortgage is not paid "within one hundred days from the entry of this decree," then the mortgaged property, or so much as might be necessary, shall "be sold by public auction, by or under the direction of the master in chancery of this Court; and that said master make such sale in accordance with the course and practice of this court," and that he report his doings in the premises, etc.

In the absence of statutory provisions, courts of equity may allow a period of redemption before a sale of the property, according to the circumstances of the case. This is always done in cases of strict foreclosure, where the decree vests the complete title in the mortgagee.

Perine v. *Dunn*, 4 Johns., Ch. 140.

The length of time is within the discretion of the Court, but the discretion does not extend to withholding it entirely.

Clark v. *Reyburn*, 8 Wall., 318.

But where the decree goes for a sale of the property, it has been considered that the debtor is sufficiently protected by the right to receive the surplus, though some courts apply the rule to such cases.

The decree in this case allowed one hundred days, and while it does not affirmatively appear what the "course and practice" of the Court below is in relation to sales on foreclosure, yet it is clear enough that the sale is absolute, and without redemption.

But in Illinois, it is provided by statute that upon

sales on judgments and decrees of foreclosure, the debtor has (and so also those claiming under him) twelve months, and his creditors fifteen months, within which to redeem.

This mortgage to Powell was executed in April, 1869.

The statutes of Illinois then provided as follows—(I quote first from the Revised Statutes of 1845, then in force, and from the laws of 1853):

"SEC. 12. Whenever any lands or tenements shall be sold by virtue of any execution, it shall be the duty of the sheriff, or other officer, *instead of executing a deed* for the premises sold, to give to the purchaser or purchasers of such lands or tenements, *a certificate in writing*, describing the lands or tenements purchased, and the sum paid therefor, or, if purchased by the plaintiff in the execution, the amount of his bid, and the time when the purchaser will be entitled to a deed for such lands or tenements, unless the same shall be redeemed, as is provided in this chapter; and such sheriff or other officer shall, within ten days from such sale, file in the office of the recorder of the county, a duplicate of such certificate, signed by him; and such certificate, or a certified copy thereof, shall be taken, and deemed evidence of the facts therein contained.

R. S. 1845, chap. 57, sec. 12, p. 302.

Gross' Statutes 1868, p. 375.

"SEC. 13. It shall be lawful for any defendant, his heirs, executors, administrators or grantees, whose lands or tenements shall be sold by virtue of any execution, within twelve months from such sale, to redeem such lands or tenements, by paying to the purchaser thereof, his executors, administrators or assigns, or to the sheriff or other officer who sold the same, for the benefit of such purchaser, the sum of money which may have been paid on the purchase thereof, or the amount given or bid, if purchased by the plaintiff in the execution, together with

interest thereon at the rate of ten per centum from the time of such sale: and on such sum being made, as aforesaid, the said sale, and the certificate thereupon granted, shall be null and void."

R. S. 1845, chap. 57, sec. 13, p. 302.

Gross' Statutes 1868, p. 376.

Sec. 14 gives fifteen months' redemption to creditors, and, together with Sec. 15, prescribes the mode of procedure. Secs. 16, 17, 18, 19, *et seq.*, relate to the same subject, and Sec. 22 provides for the issuance of a deed upon expiration of the time to redeem.

Sec. 24 is as follows: "In all cases hereafter, where lands shall be sold under and by virtue of *any decree of a court of equity, for the sale of* mortgaged lands, it shall be lawful for the mortgagor of such lands, his heirs, executors, administrators or grantees, to redeem the same in the manner prescribed in this chapter for the redemption of lands sold by virtue of executions issued upon judgments at common law, and judgment creditors may redeem lands *sold under any such decree*, in the same manner as is prescribed for the redemption of lands, in like manner, sold upon executions issued upon judgments at common law."

R. Stat. 1845, chap. 57, sec. 24, p. 305.

Gross' Statutes of 1868, p. 378.

By Sec. 2 of the "act to amend the 57th chap. of the Revised Statutes, entitled 'Judgments and executions,'" passed in 1853, it is provided: "In all cases of redemption of land from sale had under any attachment, judgment, order *or decree or proceeding thereunder*, it shall be the duty of the purchaser, sheriff, master in chancery, or other officer or person from whom said redemption takes place, to make out an instrument in writing, under his hand and seal, evidencing said redemption, which shall be recorded in the recorder's office of the proper county, in manner as other writings affecting the title to real es-

tate are filed and recorded, and which recording shall be paid for by the party redeeming."

Laws of 1853, p. 229.

Gross' Statutes 1868, p. 379.

The 16th sec. of chap. 77 of the Revised Statutes of 1874 reads thus:

"Where any real estate is sold by virtue of an execution, judgment, or *decree of foreclosure of mortgage*, or enforcement of mechanic's lien, or vendor's lien, or for the payment of money, it shall be the duty of the sheriff, *master in chancery*, or other officer, instead of executing a deed for the premises sold, to give to the purchaser a certificate describing the premises purchased by him, showing the amount paid therefor; or, if purchased by the person in whose favor the execution or decree is, the amount of his bid, the time when the purchaser will be entitled to a deed, unless the premises shall be redeemed, as provided in the act."

Rev. Statutes, 1874, chap. 77, §16, p. 596.

Sec. 18 is as follows: "Any defendant, his heirs, administrators, assigns, or any person interested in the premises through or under the defendant, may, within twelve months from said sale, redeem the real estate so sold, by paying to the purchaser thereof, his executors, administrators or assigns, or to the sheriff, or *master in chancery*, or other officer who sold the same, or his successor in office, for the benefit of such purchaser, his executors, administrators or assigns, the sum of money for which the premises were sold or bid off, with interest thereon at the rate of ten per centum per annum from the time of such sale, whereupon such sale or certificate shall be null and void."

R. S., 1874, chap. 77, § 18, p. 596.

Sec. 19 provides for redemption certificate; section 20 gives fifteen months to judgment creditors to redeem, and section 21 *et seq.* treat of the same subject. Section 30

provides for the issuance of a deed upon the expiration of the time for redemption.

It is said by this Court in *Clarke* v. *Reyburn*, 8 Wallace, 322: "In this country the proceeding in most of the States, and perhaps in all of them, is regulated by statute. The remedy thus provided when the mortgage is executed, enters into the convention of the parties, in so far that any change by legislative authority, which affects it substantially, to the injury of the mortgagee, is held to be a law impairing the obligation of the contract within the meaning of the provision of the Constitution upon the subject," and

Bronson v. *Kinzie*, 1 Howard, 311,
Williamson v. *Doe*, 7 Blackf., 13,

are cited.

In *Bronson* v. *Kinzie*, the mortgage was given at a time when redemption from sale on foreclosure decrees was not provided for by statute, and the Court held that a subsequent act of the legislature, giving twelve months' redemption, and prohibiting sale from being made at less than two-thirds the appraised value, so altered the remedy as to impair the obligation of the contract.

The Court says: "Mortgages made since the passage of these laws must undoubtedly be governed by them; for every State has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale, for the payment of a debt; and may impose such conditions and restrictions upon the creditors as its judgment and policy may dictate. And all future contracts would be subject to such provisions; *and they would be obligatory upon the parties in the courts of the United States*, as well as in those of this State."

The mortgage in the case at bar contains the provision, that upon default in payment, "this mortgage may be immediately foreclosed to pay the same by said party of

the second part, his heirs," &c., or the party of the second part, his heirs, &c., may sell the same upon notice, together with the equity of redemption of the mortgagor. (P. Rec., page 92.)

The mortgagee, Powell, elected to pursue the remedy of foreclosure by sale upon decree, and the remedy provided by existing laws, and which entered "into the convention of the parties," allowed to the mortgagor and those claiming under him, twelve months in which to redeem from sale decreed.

This bill is not a bill to carry into effect the power of sale, but is a bill simply for a decree of sale in foreclosure as if no power had been granted the mortgagor, and the direction in the decree is that the sale shall be according to "the course and practice" of the Court. It is not to be assumed that such "course and practice" can override the the statute and settled rules of property of the State of Illinois, or infringe upon the obligation of the contract between the parties, and hence it may be fairly argued that the decree is to be taken to mean a decree with the right of redemption, but authority is not lacking that the better practice is that the right should be expressly reserved and the Master directed to issue a certificate according to the statute. The decree does not state that he shall execute his deed, but it would seem that a purchaser would in fact be led to believe that he could obtain such conveyance.

Where redemption is prescribed by statute the decree must not direct the delivery of the deed until the prescribed period has expired.

James v. *Gilman*, 14 Wisconsin, 450.

Rhinehart v. *Stevenson*, 23 Ill., 524.

The proper direction is to the officer to execute a certificate to the purchaser, and in case there is no redemption within the time allowed by law, to execute a deed.

Russell v. *Jarvis*, 15 Wis., 571;

Walker v. *Jarvis*, 16 Wis., 28.

In *Harlan* v. *Smith*, 6 Cal., 173, a decree for a deed in disregard of the time limited for redemption, was held erroneous, but might be amended.

In *Farrell* v. *Parlier*, 50 Illinois, 274, the court held there was error in ordering a sale without redemption, and in *Boester* v. *Byrne, Admr.*, 72 Ill., 466, the court say: "It is lastly assigned for error, that the decree is erroneous, because it decrees that all rights of all the defendants be foreclosed, and then orders the sale of the land, when it should have been, that the mortgagor pay the amount found due, and in default of payment, that the master sell the land, and if not redeemed, then all the rights of the defendants be foreclosed. The mode suggested would have been the more formal one: but such is, substantially, the decree, as it is drawn. The statute provides for a redemption after a sale, and the decree is not to be construed as interfering with the statutory right of redemption after a sale."

The result of these cases would seem to be that the error of omitting the proper directions is not considered sufficient ground for reversal, but that the error may be corrected by a modification, or such expression of opinion by the Appellate Court as amounts to a direction as to the correct course to be pursued.

VIII.

In the foregoing pages I have assumed that the rule of selling in the inverse order of the alienation, is applicable.

Of course, if this be not so, and justice requires that all these blocks must, under the circumstances, contribute rateably, or be sold without reference to conveyances subsequent to the mortgage, the decree is fatally erroneous.

Respectfully submitted,

MELVILLE W. FULLER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

EMERSON G. ORVIS,
Appellant.
v.
NATHAN POWELL et al.,
Appellees.

No. 288.

POINTS IN REPLY.

MELVILLE W. FULLER.
Of Counsel.

CHICAGO:
CHICAGO LEGAL NEWS CO., PRINTERS, 151 & 153 Fifth Ave.
1878.

United States Supreme Court.

EMERSON G. ORVIS,
Appellant,
v.
NATHAN POWELL, *et al.*
Appellees.

No. 288.

POINTS IN REPLY.

I.

The motion to dismiss should be overruled.

First: It comes too late.

June 5, 1875, the decree complained of was entered.

July 3d, 1875, a written motion for an appeal was filed, and on the 29th day of July, an order stating the prayer for an appeal, and the allowance thereof, was entered.

Bond filed and approved Aug. 16, 1875.

Record filed in this Court, Oct. 23, 1875.

By Sec. 1008 of the Revised Statutes (p. 188), it is provided that no appeal can be prosecuted after the lapse of two years from the entry of the decree.

Had the appellant submitted this motion upon the

docketing of the case and the motion had been sustained, an appeal could still have been prayed, and the objection, if tenable, obviated. Instead of doing this, appellant, after the lapse of the period within which another appeal could be prosecuted, submits the motion for the first time, thereby, if it be sustained, cutting off any examination of the cause upon its merits. This mode of preventing a reversal ought not to be tolerated.

It should be observed also, that since by the running of the statute, no other appeal can now be taken, the argument that a case can not be heard by instalments, is deprived of any weight in this case, asthe record can not be brought up again by any one of the parties.

Second: It is not well founded.

If the decree had been rendered upon a cross bill, and the complainant in such cross bill had appealed therefrom, the appeal being prayed in due time in open court, as here, and therefore no citation necessary, the objection could certainly not have been raised.

And this would also appear to be so in that class of cases in which relief is or may be accorded the defendant upon his answer. If it be relief adverse to complainant and co-defendants, the appeal of a defendant so situated brings up the record precisely as it would be if he were complainant in a cross-bill.

Now, the decree in this case is precisely such a decree as would be rendered upon a cross-bill, and the Court has committed fatal error in entering it in the absence of such a pleading, if it be true, as insisted by counsel, that such a decree cannot be entered upon answers alone. Counsel are therefore driven to contend that by reason of fatal error in the decree, the appeal should be dismissed and the error perpetuated.

If, on the other hand, a decree directing sale in the inverse order, and defining that order, is proper upon an-

swer, as seems probable, (Story's Eq. Pl. § 392 a), then the objection is not well taken.

If in view of the whole case the Court is not prepared to sanction the decree, as entered, and such would be the effect of the motion if granted, then the motion will be overruled.

U. S. v. *Gormly*, 1 Wallace, 690.

The most the Court would do in the premises would be to order the cause to stand over, and the error, if one, to be corrected, under sec. 1,005 of the Revised Statutes (p. 187.)

II.

The Court erred in entering the decree in question.

This is certainly so if counsel be correct in the position that the parcels cannot be sold in the inverse order without a cross-bill, and that there is no sufficient pleading of that kind here.

And it is so upon the merits, because the rule of sale in the inverse order, or even in parcels, will not be applied in any case where its application will work injustice.

2 Jones on Mortgages, §§ 1621, 1616.

Hill v. *McCarter*, 27 N. J. Eq., 41.

Respectfully submitted.

MELVILLE W. FULLER,

Of Counsel.

Supreme Court of the United States.

October Term, 1877.

No. 288.

EMERSON G. ORVIS,

Appellant,

VS.

NATHAN POWELL,

Appellee.

Brief in behalf of Appellant, and of John P. Squires,

ONE OF THE DEFENDANTS.

O. D. BARRETT.
B. F. BUTLER,
Of Counsel.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1878.

Supreme Court of the United States.

EMERSON G. ORVIS, Appellant,

vs.

NATHAN POWELL, Appellee.

Statement of the Case.

This is a bill in equity, brought July 23, 1874, by the appellee, Powell, to foreclose a mortgage given on the northeast quarter of the southwest quarter, section 5, township 38 north, range 14, east of the third principal meridian, being land in Cook county, Illinois, by Henry H. Walker to Powell, to secure a note for forty thousand five hundred dollars, made by said Henry H. Walker and Samuel J. Walker, dated the 13th of March, 1869, payable twelve months after date, with interest at the rate of ten per centum per annum until paid. The mortgage contained a power of sale, and the note secured thereby was dated before the purchase of any title in said mortgaged premises was made by said Walker from said Powell, his grantor. (Rec., pp. 91, 92.)

The bill admits the payment of $28,000 of said mortgage debt, and prays for a sale of the south half of said northeast quarter of said southwest quarter section, and that the proceeds be applied to the payment of the balance

of said debt, amounting to the sum of $12,500, and interest thereon, alleging that the north half of said quarter section had been released.

After the making of the mortgage, Henry H. Walker conveyed the land in question to Samuel J. Walker by quit-claim deed, recorded September 19, 1870.

On the 30th September, 1870, Samuel J. Walker subdivided the *locus de quo*, and, on the same day, recorded the plat thereof, said south half being divided into blocks numbered 13, 14, 15, 16, 17, and 18.

These several blocks passed out of said Samuel J. Walker, in different subdivisions, by several mesne conveyances; and the south 100 feet of block 16 passed into the appellant, Orvis. The remainder of said blocks 13, 14, 15, 16, 17, and 18 passed into the other defendants by several mesne conveyances, so that at the date of the filing of the bill no part of said land remained in said Henry H. Walker, the mortgagor.

Twelve answers, including an amended answer, were filed by different defendants, owners of said land, some of these answers being separate and some joint, and a decree *pro confesso* was taken against fifteen of the defendants, some of whom did not appear, and none of whom answered the bill.

Separate replications were filed to nine of the twelve answers, but the cause was heard without replication to the answer of Symmons and Pratt, and the answer and amended answer of Greenbaum and Foreman and the answer of Abt.

Four of the defendants, Levi Abt, the International Bank of Chicago, S. A. Ricker, and Orvis, the appellant, filed cross-bills. Those of said Abt and of said bank were filed, and dismissed without any other proceeding having been taken under either of them. None of the defendants to Ricker's cross-bill were parties to the original bill. A

writ of subpœna against the defendants named in this cross-bill is prayed for, but none is issued, and none of the defendants answer it or even enter their appearance, but it went to the master; evidence under it was taken by him, his findings thereon appear in his report, (Rec., p. 57,) and the court affirmed said findings in its final decree. (Rec., p. 86.)

The cross-bill of Orvis was filed under the following order, to wit: "On motion, leave is given Emerson G. Or-" vis to file a cross-bill herein, and the defendants therein " are ruled to answer the same in five days." (Rec., p. 51.)

Orvis makes as defendants Coolbaugh and Powers, (both of whom were his co-defendants in the original suit,) and Louisa M. Tillinghast, who is not a party to the original suit. (Rec., p. 53.)

A writ of subpœna against them is prayed for, but none is issued; but the following stipulation is entered into: "It " is hereby stipulated and agreed that the answers of Wil-" liam F. Coolbaugh and Heman G. Powers to the original " bill of complaint herein, together with the cross-bill of " Sherman A. Ricker, shall stand for and be regarded as " the answer of said Coolbaugh, Powers, and Ricker to the " cross-bill of said E. G. Orvis filed herein, and the testi-" mony taken under the cross-bill of Sherman A. Ricker " shall be regarded and considered as if taken also in the " cross-bill of said Orvis."

"HUGH ALEXANDER, JR.,
"*Solicitor for E. G. Orvis et al.*
"FULLER & SMITH,
"*Solicitors for Coolbaugh, Powers, and Ricker.*"

Rec., p. 54.

So Orvis got answers from two of the defendants in his cross-bill, and also an answer from Ricker, who was not a defendant thereto, but failed to get any answer from his

defendant, Tillinghast, imported by him from outside the original bill. No replication to the answers was filed.

The master's report passes by the cross-bill of Orvis in silence, but the final decree disposes of it as follows:

"It is further ordered that the cross-bill of complaint "filed in this cause by said Emerson G. Orvis be dismissed "for want of equity." (Rec., p. 88.)

The object of the cross-bill was to obtain a discovery essential to Orvis in defending himself against his co-defendants, and also for relief.

Afterwards, on the 27th day of March, 1875, Henry W. Bishop, the master in chancery, filed his master's report in said circuit court in the case of the original bill and the cross-bill of Sherman A. Ricker, one of the defendants in the above-entitled cause. (Rec., p. 54.) It is recited in said master's report that, "The cause having been referred "to said master to take proof, and report the same to "the court under the original bill, and by an order of said "court to take proofs and report the same to the court "under the said cross-bill herein, I do report that Julius "Mulvey, esquire, solicitor for the complainant in the "original bill, produced in evidence before me all the "papers filed in said cause, including the bill of complaint "in the original bill herein, together with the promissory "note and mortgage set forth in said original bill."

The master further reports that there was produced in evidence before him an abstract of title to the property mentioned in the mortgage to said complainant in the original bill as set out and described in the original bill, and that the several solicitors appearing for the defendants therein stipulated that the said abstract of title "so offered "in evidence as last aforesaid" truly represented the record of the different instruments thereby shown, so far as purports to the dates of filing the same, and that the same

might be used as evidence in lieu of original documents, subject, however, to contradiction by any competent evidence. (Rec., p. 56.)

The master further reported under the above-recited order the title of the several parties in said blocks Nos. 13 to 18, inclusive, and also found that "the equities of the said "defendants in the original bill are such that the property "included in said mortgage to the complainant in the orig- "inal bill, which still remains the security thereunder, and "which has not been released, should be offered for sale "in the following manner, to wit:

"First, the north 201 feet of block 16. If the amount "realized shall be insufficient to pay and satisfy the total "amount due and owing to said complainant in the origi- "nal bill, then should be offered for sale, second, the south "100 feet of block 16; and if the two amounts should not "be sufficient, then block 14; and if that is not sufficient "to pay, then block 13. In case the amount so realized "was not sufficient, then block 15; then block 17."

The master further reports that the cross-bill of Ricker, one of the defendants, having been referred, to take proof and report on the same, he finds that there was a contract for sale with Louisa M. Tillinghast, who was not a party in the original bill, for the sum of $11,593, of the south half of block 18, which contract was dated 3d September, 1874, and was not recorded, and that it would appear, if the same had been duly recorded, that said premises were liable to be sold for the payment of said mortgage indebtedness to the complainant in the original bill. This contract was dated after the original bill was filed. (Rec., p. 57.)

The master also reports that there is in the hands of Robert Hervey (not a party in the original bill) certain securities from the sale of a portion of the premises covered by said mortgage, held in escrow by said Robert Hervey,

and not to be delivered until the portion, to wit, block 16, should be freed from all incumbrances; and that said Walker's interest in said security should be also sold, and the proceeds applied to extinguish said mortgage indebtedness, before the sale of any other portion covered by said mortgage. (Rec., pp. 56, 57, 58.)

Thereafterwards, to wit, on Thursday, the 5th day of April, 1875, an order was passed by the circuit court, "That the report of Henry W. Bishop, Esq., master in "chancery, of the amount due complainant herein, hereto- "fore filed in this cause, be ratified, unless cause be shown "to the contrary by Monday morning next." (Rec., p. 84.)

Sherman A. Ricker excepted to the report of the master for the following reasons:

"EXCEPTION 1. Said report finds that block fourteen, (14,) "Packer's subdivision, &c., owned by said Sherman A. "Ricker, is first liable to sale under said mortgage, whereas "it should find that said lot is not first liable to sale."

"EXCEPTION 2. Said report does not find that block six- "teen (16) is liable to sale before block fourteen, (14,) "whereas it should find that said block sixteen (16) is so "liable to sale before said block fourteen (14.)"

"EXCEPTION 3. Said report does not find that the north "201 feet of block sixteen (16) is liable to sale before "said block fourteen, (14,) whereas it should so find."

"EXCEPTION 4. Said report does not find that the south "100 feet of said block sixteen (16) is liable to sale before "said block fourteen, (14,) whereas it should so find."

"EXCEPTION 5. Said report does not find that the south "half (S. $\frac{1}{2}$) of block eighteen (18) in said Packer's subdi- "vision should be first sold under said foreclosure pro- "ceedings, whereas it should so find."

"EXCEPTION 6. Said report does not (in terms) find that "the securities in the hands of Robert Hervey, Esq., are "liable to sale before any portion of the mortgaged prem- "ises can be sold, whereas it should so find." (Rec., p. 83.)

Thereafter, upon argument and advisement, the court sustained said exceptions so far as they relate to block 14, therein mentioned, which said master found first liable under these proceedings, and it was therefore ordered that said report be reformed by providing that block 16 first be sold in the way mentioned in said report, and after that block 14, and then the order of sale, as indicated in said report, should be followed. (Rec., p. 85.)

Meanwhile the cross-bill of said Orvis had not been answered, save by the stipulation referred to, that certain answers to the original bill and a certain cross bill of another defendant should be taken as answers. No replications had been filed therein, nor had the cause upon the cross-bill and answer been set down to be heard on both bill and such answers as there were.

Notwithstanding said order and decree of the court sustaining the exceptions, so far as they relate to block 14, and that said report be reformed, and providing that block 16 shall first be sold in the way mentioned in said report, and after said block 14, without any further hearing or proceedings being had the court entered a decree, in which it is found that—

"The south one-half (S. ½) of the northeast one-quarter "(N. E. ¼) of the southwest one-quarter (S. W. ¼) of sec- "tion 5, township thirty-eight (38) north, of range four- "teen, (14,) east of the third (3d) principal meridian, in "Cook county, in the State of Illinois, is the property "covered by the mortgage to the said Nathan Powell, "complainant herein, and liable for the payment of the "amount now due on the note secured by said mortgage, "to wit, the sum of fourteen thousand eight hundred and "fifty-three dollars and thirty-three cents.

"The court also finds that the material allegations of "the cross-bill, filed herein by Sherman A. Ricker, one of "the defendants, are sustained by the proofs, and that

" there is in the hands of Louisa M. Tillinghast, and in " the hands of Robert Hervey, attorney of William Flan- " nagan, certain moneys, notes, or securities arising from " sales, or contracts of sale, of portions of the above- " described premises, so as aforesaid conveyed in mort- " gage to the said Nathan Powell, which ought in equity " to be brought into court, here to be sold under the direc- " tion of the court, and first applied to the liquidation of " the amount due on said mortgage of said complainant, " as set out in said cross-bill.

" The court also finds that the premises covered by said " mortgage as aforesaid have been subdivided since the " date of said mortgage, and that the property covered by " said mortgage is now known and described as blocks " thirteen, (13,) fourteen, (14,) fifteen, (15,) sixteen, (16,) " seventeen, (17,) and eighteen, (18,) of Packer's subdivis- " ion of the northeast quarter (N.E. $\frac{1}{4}$) of the southwest " quarter (S.W. $\frac{1}{4}$) of section five, (5,) township thirty- " eight (38) north, of range fourteen, (14,) east of the third " (3d) principal meridian.

" That since the giving of said mortgage by Henry H. " Walker to said complainant conveyances of different " blocks and parts of blocks in said subdivision have been " made, and that, following the inverse order of the alien- " ation thereof, the said blocks and parts of blocks are lia- " ble to be, and should be, sold in the following order, viz:

" *First.* The north two hundred and one (201) feet of " block sixteen in said subdivision, excepting and reserving " therefrom all the estate, right, title, interest, claim, prop- " erty, and demand of the said John G. Rogers and of the " said Elias Greenebaum and Gerhard Foreman therein, " under and by virtue of the certain deed of trust executed " by John D. Kinney to said John G. Rogers, bearing date " the twenty-fifth day of November, A. D. 1872, and filed " for record in the recorder's office of Cook county, Illi- " nois, on the twenty-third day of October, A. D. 1873, and " recorded therein in book 266, on page 453, and subject " thereto.

" *Second.* The south one hundred (100) feet of said " block sixteen.

" *Third.* Block fourteen (14) in said subdivision.

"*Fourth.* All the said estate, right, title, interest, claim, "property, and demand of the said John G. Rogers and of "the said Elias Greenebaum and Gerhard Foreman of, in, "and to said north two hundred and one (201) feet of said "block sixteen, (16,) under and by virtue of said deed of "trust so as aforesaid executed by said John D. Kinney to "said John G. Rogers, hereinbefore excepted and reserved.

"*Fifth.* Blocks thirteen (13) and eighteen (18) in said "subdivision.

"*Sixth.* Block fifteen (15) in said subdivision.

"*Seventh.* Block seventeen (17) in said subdivision.

"And this court, being fully advised in the premises, "doth find and adjudge that all the material allegations in "the said bill of complaint and in said cross-bill of Sher-"man A. Ricker contained have been fully proved, and "that there is due to said Nathan Powell, the complainant "in this cause, from the said defendants Henry H. Walker "and Samuel J. Walker, the sum of fourteen thousand "eight hundred and fifty-three dollars and thirty-three "cents, with interest thereon from the seventeenth day of "March, A. D. 1875, the date of said master's report.

"It is therefore, upon motion of counsel for the com-"plainant, ordered, adjudged, and decreed, and this court, "by virtue of the power and authority in it vested, doth "order, adjudge, and decree that the said Louisa M. Til-"linghast pay or cause to be paid into court, within ten "days from the entry of this decree, the sum of twelve "thousand six hundred and sixty and $\frac{7}{100}$ dollars, being the "amount due from said Louisa M. Tillinghast, as purchase-"money of the south half of block eighteen, (18,) in said "Packer's subdivision, according to the contract of sale "heretofore executed between said Tillinghast, Samuel J. "Walker, William F. Coolbaugh, and Heman G. Powers."

"And it is further ordered, adjudged, and decreed by "the court that the said William Flannagan pay or cause "to be paid into court, within ten days from the day of "the entry of this decree, the sum of eleven thousand "eight hundred and forty-three $\frac{33}{100}$ dollars, being the "amount agreed to be paid by said Flannagan, as part "purchase-money for the north two hundred and one (201) "feet of block sixteen (16) in said Packer's subdivision,

" there is in the hands of Louisa M. Tillinghast, and in " the hands of Robert Hervey, attorney of William Flan- " nagan, certain moneys, notes, or securities arising from " sales, or contracts of sale, of portions of the above- " described premises, so as aforesaid conveyed in mort- " gage to the said Nathan Powell, which ought in equity " to be brought into court, here to be sold under the direc- " tion of the court, and first applied to the liquidation of " the amount due on said mortgage of said complainant, " as set out in said cross-bill.

" The court also finds that the premises covered by said " mortgage as aforesaid have been subdivided since the " date of said mortgage, and that the property covered by " said mortgage is now known and described as blocks " thirteen, (13,) fourteen, (14,) fifteen, (15,) sixteen, (16,) " seventeen, (17,) and eighteen, (18,) of Packer's subdivis- " ion of the northeast quarter (N.E. $\frac{1}{4}$) of the southwest " quarter (S.W. $\frac{1}{4}$) of section five, (5,) township thirty- " eight (38) north, of range fourteen, (14,) east of the third " (3d) principal meridian.

" That since the giving of said mortgage by Henry H. " Walker to said complainant conveyances of different " blocks and parts of blocks in said subdivision have been " made, and that, following the inverse order of the alien- " ation thereof, the said blocks and parts of blocks are lia- " ble to be, and should be, sold in the following order, viz:

" *First.* The north two hundred and one (201) feet of " block sixteen in said subdivision, excepting and reserving " therefrom all the estate, right, title, interest, claim, prop- " erty, and demand of the said John G. Rogers and of the " said Elias Greenebaum and Gerhard Foreman therein, " under and by virtue of the certain deed of trust executed " by John D. Kinney to said John G. Rogers, bearing date " the twenty-fifth day of November, A. D. 1872, and filed " for record in the recorder's office of Cook county, Illi- " nois, on the twenty-third day of October, A. D. 1873, and " recorded therein in book 266, on page 453, and subject " thereto.

" *Second.* The south one hundred (100) feet of said " block sixteen.

" *Third.* Block fourteen (14) in said subdivision.

"*Fourth.* All the said estate, right, title, interest, claim, "property, and demand of the said John G. Rogers and of "the said Elias Greenebaum and Gerhard Foreman of, in, "and to said north two hundred and one (201) feet of said "block sixteen, (16,) under and by virtue of said deed of "trust so as aforesaid executed by said John D. Kinney to "said John G. Rogers, hereinbefore excepted and reserved.

"*Fifth.* Blocks thirteen (13) and eighteen (18) in said "subdivision.

"*Sixth.* Block fifteen (15) in said subdivision.

"*Seventh.* Block seventeen (17) in said subdivision.

"And this court, being fully advised in the premises, "doth find and adjudge that all the material allegations in "the said bill of complaint and in said cross bill of Sher- "man A. Ricker contained have been fully proved, and "that there is due to said Nathan Powell, the complainant "in this cause, from the said defendants Henry H. Walker "and Samuel J. Walker, the sum of fourteen thousand "eight hundred and fifty-three dollars and thirty-three "cents, with interest thereon from the seventeenth day of "March, A. D. 1875, the date of said master's report.

"It is therefore, upon motion of counsel for the com- "plainant, ordered, adjudged, and decreed, and this court, "by virtue of the power and authority in it vested, doth "order, adjudge, and decree that the said Louisa M. Til- "linghast pay or cause to be paid into court, within ten "days from the entry of this decree, the sum of twelve "thousand six hundred and sixty and $\frac{7}{100}$ dollars, being the "amount due from said Louisa M. Tillinghast, as purchase- "money of the south half of block eighteen, (18,) in said "Packer's subdivision, according to the contract of sale "heretofore executed between said Tillinghast, Samuel J. "Walker, William F. Coolbaugh, and Heman G. Powers."

"And it is further ordered, adjudged, and decreed by "the court that the said William Flannagan pay or cause "to be paid into court, within ten days from the day of "the entry of this decree, the sum of eleven thousand "eight hundred and forty-three $\frac{33}{100}$ dollars, being the "amount agreed to be paid by said Flannagan, as part "purchase-money for the north two hundred and one (201) "feet of block sixteen (16) in said Packer's subdivision,

"with accrued interest thereon; the said sums, and each "of them, so to be paid into court, to be applied under the "direction of the court as the rights of the parties may "appear, and as to equity shall seem meet."

"It is further ordered, adjudged, and decreed by the "court, that if the said Louisa M. Tillinghast and the said "William Flannagan shall fail to pay or cause to be paid "into court, within the time aforesaid, the said several "sums of money so as aforesaid ordered to be paid into "court, or if from any cause a sum of money sufficient to "liquidate the amount due said complainant, Powell, "on the mortgage aforesaid shall not be realized out of "said Tillinghast and Flannagan moneys, so as aforesaid "ordered to be paid into court, then it is further ordered, "adjudged, and decreed by the court that unless the said "Henry H. Walker, or some of the other defendants "in this case, pay or cause to be paid to the complainant, "within one hundred days from the entry of this decree, "the said sum so found to be due to the complainant, "with interest thereon from the said seventeenth day of "March, A. D. 1875, being the date of said master's re-"port, the said mortgaged premises, or so much of same "as may be necessary for the payment of the amount due "on said mortgage, with costs of this suit, be sold by "public auction, by or under the direction of the master "in chancery of this court, and that said master make "such sale in accordance with the course and practice of "this court, and that at such sale the complainant, or any "of the parties to this suit, may become the purchaser."

"It is further ordered, adjudged, and decreed that said "master, first offer said premises separately, in parcels, "in the manner and order as hereinbefore provided; and "if, when offered in that way, an amount sufficient to pay "what is due and owing to complainant cannot be realized, "that then the said master offer and sell said premises as "a whole, by the description thereof herein first above "named, and without reference to any subdivision thereof "whatever, and without any exception or reservation there-"from whatever."

"It is further ordered that the cross-bill of complaint "filed in this cause by said Emerson G. Orvis be dis-"missed for want of equity." (Rec., p. 85.)

It will be seen that notwithstanding the decree of the court sustaining the exceptions to the master's report as to the order of sale of the several lots, to wit, 16 before 14, the court adopted the precise inverse order of sale that it set aside, and reformed in the master's report.

It is further necessary in the statement of the case to notice that a stipulation, making an abstract of title evidence, is found on pages 93–94 of the Record, by which it appears that the only title held by H. H. Walker when he made his mortgage to the property in question was an undivided quarter of the southwest quarter of section 5, although Walker had no interest in severalty in the northeast quarter of said southwest quarter section.

Upon this statement of facts set out in the record the appellant assigns the following errors:

Assignment of Errors.

I.

The court below erred in not passing a decree to dismiss the plaintiff's bill.

II.

In not passing such a decree as would subject all of the interests of the defendants, as shown by the abstract of title, in the south half of the northeast quarter of the southwest quarter of section 5, T. 38 north, R. 14, east of 3d principal meridian, *pro rata* in satisfaction of the Powell mortgage.

III.

In decreeing a sale of the land and the buildings thereon, described in said Powell's mortgage, instead of decreeing a sale of one-fourth undivided interest in said lands, the only interest that passed to said Powell by said mortgage.

IV.

In not providing in the decree for the right of redemption, as secured to the defendants by the statute laws of the State of Illinois.

V.

If the court shall be of the opinion that the rule, based on the inverse order of the alienation of the premises by the mortgagor or his aliences, is a part of the *lex loci*, then the court below erred in the application of the rule to the facts in this case, as established by the pleadings and the evidence.

VI.

In dismissing the cross-bill of Emerson G. Orvis.

VII.

In considering, as a part of the case, any part of the master's report save the evidence reported by the master and his certificate relating to said evidence.

VIII.

In confirming on the 8th of April, 1875, any part of the master's report *nisi* or absolutely.

ARGUMENT ON THE ERRORS ASSIGNED IN THE ORDER OF THEIR ASSIGNMENT.

I.

The court below erred in not passing a decree to dismiss the plaintiff's bill. The plaintiff in the bill (R., p. 4) alleges that "neither the said Henry H. Walker, or the said "Samuel J. Walker, nor any person or persons in their "behalf or in behalf of either of them, hath ever paid or "caused to be paid to your orator the said balance of

" $12,000 of the said principal sum of $40,000, and $500 " of said promissory note or any part thereof; nor the " interest which accrued thereon since the first day of No- " vember, in the year A. D. eighteen hundred and seventy- " two, or any part thereof, but the same still remains wholly " due and unpaid to your orator contrary to the proviso of " said mortgage."

The said Walkers in their answer (R., p. 40) admit the promissory note, the mortgage, and the payments made and endorsed on the note, and add, " but these defendants " deny that there is now due on said principal of said " mortgage debt the balance of $12,000, or any balance " whatever. But on the contrary they aver that large sums " of money have been paid by the defendants to the said " complainant on account of the said principal debt other " than those mentioned as being credited thereon in said " bill, which ought to be credited upon the said principal " sum, and that when said sums are credited upon said " principal sum the same will be wholly cancelled."

The appellant in his answer (R., p. 9) makes no admission as to the mortgage, the note, or the amount due thereon, but calls for strict proof.

The complainant, therefore, in his bill makes an allegation material and necessary to the relief prayed for.

The defendant, in response, denies this allegation directly, squarely, and completely. (3 Green. Ev., 285, *n.* 2, and authorities there cited.)

The answer is not under oath, the oath having been waived by the plaintiff, but all authorities agree that such an answer, when responsive to the bill, is sufficient to put the complainant to his proofs.

Now, what are the proofs offered by the complainant?

The master, in his certificate, (R., p. 55,) certifies on the 16th day of November, 1874, " I was attended on said day " by Julius Mulvey, Esq., solicitor for the complainant in

"the original bill, who produced in evidence before me "*all the papers filed in said cause*, including the bill of "complaint in the original bill herein, together with the "promissory note and mortgage mentioned and set forth "in said original bill."

This is all the evidence offered to support the allegation made in the bill as above set forth and denied in the answer as aforesaid.

Both the mortgage and the note having been admitted in the answer, the evidence as to the original debt adds nothing in support of the plaintiff'sa llegations, for it is simply proof of allegations admitted by the answer, and which, consequently, needed no proof. The case is, therefore, to be decided as if no evidence of indebtedness had been offered.

To obtain the relief prayed for the plaintiff made the allegation he did, to wit, that the debt was unpaid. The defendant says it is paid. The plaintiff, therefore, cannot have the relief prayed for until he shall have overcome this allegation of the answer by proper evidence.

This he has utterly failed to do, and not only failed to do it, but having himself produced in evidence the answer of said Walker, he has established by his own evidence the fact alleged, that the debt had been wholly paid.

The bill, therefore, should have been dismissed.

II.

The court below erred in not passing such a decree as would subject all of the interests of the defendants, as shown by the abstract of title, in the south half of northeast quarter of the southwest quarter of section 5, T. 38 north, R. 14, east of 3d principal meridian, *pro rata* in satisfaction of the Powell mortgage.

This question has come but once before this court. The

decision of it is found in the case of Hughes *vs.* Edwards, (9 Wheaton, 489.) This was a suit to foreclose a mortgage on real estate, part of which remained in the possession of the mortgagors, Hughes, or his heirs, and certain purchasers from the mortgagor.

Mr. Justice Washington, in delivering the opinion of the court, said: "Before concluding this opinion it may be "proper to notice a point which was made by the counsel "for the appellants, although it was not much insisted upon. "It was that the balance due upon this mortgage ought to "have been apportioned upon all the purchasers from "Hughes. The bill was properly dismissed as to all the "defendants, except the heirs and representatives of "Hughes, Tandy, and Patterson, upon their answers deny-"ing the equity of the bill, and from these decrees no ap-"peal was taken. As to Tandy and Patterson, who "acknowledge themselves to be purchasers with notice, "they stand precisely in the situation of the mortgagor, "and the mortgagees have nothing to do with the relative "rights to contributions amongst themselves. They are "entitled to be paid the debt due to them, and to call for a "foreclosure and sale of all the mortgaged property, "whether it be in the possession of the mortgagor or in "others to whom he has sold it. If either of these de-"fendants should pay more than his proportion of the "debt according to the relative value of the property "they possess, that is a matter to be settled amongst them-"selves. But it would be most unreasonable to force the "mortgagees into the delay and expense incident to the ad-"justment of those differences between persons with whom "they have no concern. The conveyances by the mort-"gagor to them are void as to the mortgagees, against "whom they have no right, except that of redeeming upon "the payment of the mortgage debt and interest."

This is no new doctrine. In the case of Barnes *vs.* Rackster, (1 Younge and Collyer's New Reports, 403,) it was decided that where there is a first mortgage on two estates, a second on one of them, and a third on the other or both, the right of marshaling will not be exercised in favor of the second against the third mortgagee, though with notice of the second encumbrance. In such case the first mortgage will be ratably apportioned between the two estates.

In Adams' Equity (370) we find the following: "Upon "this subject the law is perfectly settled. All the alienees "of the lands of a debtor bound by a judgment or recog- "nizance, no matter in what order the alienations were "made, are bound to bear equally the burden of satisfy- "ing the judgment by mutual contributions *pro rata* ac- "cording to the value of the property held by them, all "being considered as in *æquali jure*, without regard to "priority of their purchases or conveyances. Authorities "for this doctrine are referred to in 5 Vin. Abr., tit. Con- "tribution and Av."

In the case of Beverly *vs.* Brooke (2 Leigh, 425,) the court said: "It is a doctrine well established that where "land is charged with a burden the charge ought to be "equal, and one part ought not to bear more than its due "proportion; and equity will preserve this equality by "compelling the owner of each part to a just contribu- "tion. I need not go at large into the doctrine. It is "perfectly well understood; and I had occasion recently "to examine it in the case of Cheesborough *vs.* Millard."

In the American notes to the case of Aldrich *vs.* Cooper—Leading Cases in Equity, p. 180—we find the following comments on the inverse order rule: "On the whole, it "would seem that this doctrine is too delicate in its nature "and dependent upon too many minute considerations to

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" be administered with advantage, and that the rule of " equal contribution, if less just in theory, is better suited " to application in practice."

5 Story Eq. Ju., secs. 477, 478, 484, 1233*b*, and the numerous cases there cited.

Also, Taylor *et al. vs.* Wilson, 7 Mass., 255.

Green *vs.* Ramage, 18th Oh., 429.

The State courts of Illinois have never had the question presented for decision. True, the supreme court of the State assumed to decide this question in the case of Iglehart and others *vs.* Crane and Wesson, (42 Ill., 261.)

In this case, Crane and Wesson sold, in 1853, a tract of land in Chicago to Iglehart, for $25,000, of which five hundred dollars was paid down, and for the balance of the purchase-money Iglehart gave his bond and secured the same by a mortgage on the premises sold—the bond calling for payment in certain sums quarterly; and also for the payment, every three months, of all moneys received by Iglehart upon the sale of lots, to be applied as a credit upon the instalment next falling due upon said land.

Iglehart divided the tract into 151 lots. By 1861 a large share of these lots had been sold—whether all or not does not appear. Fifty-seven of the lots sold had been formally released by the mortgagees, with actual knowledge on their part that other lots had been sold prior to the sale of some of the released lots.

In a suit to foreclose the mortgage in 1861 "the court " pronounced a decree for the unpaid purchase-money, and " distributed the payment among all the unreleased lots." From this decree an appeal was taken so far as it related to eight of the unreleased lots.

There is nothing in the case to show that the purchase-money received by Iglehart for those eight lots was not

applied by him, under the terms of the bond, towards the payment of Iglehart's mortgage indebtedness to Crane and Wesson. In absence of all proof to the contrary the presumption is that it was so applied. If it was so applied, the purchasers of said lots were entitled to a release from the Crane and Wesson mortgage.

The only question, therefore, before the court on appeal was as to whether the purchase-money for those eight lots had been applied to the payment of Iglehart's indebtedness to Crane and Wesson, the mortgagees, under the terms of the bond. The bond by its very terms made it of no consequence as to the order of time in which said eight lots were sold, or whether other lots had or had not been released.

Now, the fact that the appellate court, overlooking the questions of law presented in the case before it, decided it upon an hypothesis that had no foundation in the cause, leaves the decision of no authority. Indeed, it makes it, as an authority, simply a minus quantity, for if the court could so easily mistake the facts of its case, it is to be presumed that, with equal facility, it mistook the law of the case, and absence of all allusion to the case in 9 Wheaton tends to the conclusion that the law of the case had only in part been brought to the attention of the appellate court.

It follows, therefore, that the question at issue has been once presented to this court, and resolved in favor of the *pro rata* rule, and that the question has never actually been presented to the State courts of Illinois.

It is submitted that in such a case this court is bound to follow its own previous interpretation of the law, irrespective of the decisions of the same question made in States other than Illinois.

III.

The court below erred in decreeing a sale of the land

and the buildings thereon described in said Powell's mortgage, instead of decreeing a sale of one-fourth undivided interest in said land, the only interest that passed to said Powell by said mortgage.

The abstract of title shows that H. H. Walker's estate in the lands he mortgaged to Powell was limited to the undivided fourth interest in the same.

Powell sold to him an undivided fourth interest in the S.W. ¼ of section five, for what consideration does not appear, and afterwards took this mortgage on the N.E. ¼ of said quarter section. This being a suit between the original parties, and the real facts as to the title appearing in the case, the court was bound to take notice of the extent of Walker's interest conveyed actually by the mortgage, and conform its decree to those facts. It was, therefore, error to decree a sale of more than a one-fourth undivided interest in any of said blocks.

IV.

The court below erred in not providing in its decree for the right of redemption secured to the defendants by the statute law of Illinois.

This point is so ably and forcibly discussed in the brief of Melville Fuller, Esq., filed in this cause, that counsel for the appellant adopt it entire.

Mr. Fuller says:

"Strict foreclosures are allowed in Illinois upon allegations and proof of the insolvency of the mortgagor and inadequacy of the security, and where mortgagee is willing to take the property and discharge the debt.

"But they are held not to be proper where there are other incumbrances or creditors, or purchasers of the equity of redemption.

"Farrell *vs.* Parlier, 50 Ill., 274.

"The bill in this case is not one for a strict foreclosure. It lacks the proper averments, although it is alleged that the security is scanty, and as to the proofs there is no evidence upon which a decree of strict foreclosure, as such, could be founded. On the contrary, the record is full of proof that the property is worth many times the amount due. The bill sought a sale, and this is what is awarded by the decree.

"It is provided, that if the amount found due upon the mortgage is not paid 'within one hundred days from the 'entry of this decree,' then the mortgaged property, or so much as might be necessary, shall 'be sold by public auc-'tion, by or under the direction of the master in chancery 'of this court; and that said master make such sale in 'accordance with the course and practice of this court,' and that he report his doings in the premises, etc.

"In the absence of statutory provisions, courts of equity may allow a period of redemption before a sale of the property, according to the circumstances of the case. This is always done in cases of strict foreclosure where the decree vests the complete title in the mortgagee.

"Perine *vs.* Dunn, 4 Johns. Ch., 140.

"The length of time is within the discretion of the court, but the discretion does not extend to withholding it entirely.

"Clark *vs.* Reyburn, 8 Wall., 318.

"But where the decree goes for a sale of the property, it has been considered that the debtor is sufficiently protected by the right to receive the surplus, though some courts apply the rule to such cases.

"The decree in this case allowed one hundred days, and while it does not affirmatively appear what the "course 'and practice' of the court below is in relation to sales

on foreclosure, yet it is clear enough that the sale is absolute, and without redemption.

"But in Illinois it is provided by statute that upon sales on judgments and decrees of foreclosure, the debtor has (and so also those claiming under him) twelve months, and his creditors fifteen months, within which to redeem.

"This mortgage to Powell was executed in April, 1869.

"The statutes of Illinois then provided as follows, (I quote first from the Revised Statutes of 1845, then in force, and from the laws of 1853:)

"'SEC. 12. Whenever any lands or tenements shall be 'sold by virtue of any execution, it shall be the duty of 'the sheriff or other officer, *instead of executing a deed* for 'the premises sold, to give to the purchaser or purchasers of 'such lands or tenements *a certificate in writing*, describing 'the lands or tenements purchased, and the sum paid 'therefor, or, if purchased by the plaintiff in the execution, 'the amount of his bid, and the time when the purchaser 'will be entitled to a deed for such lands or tenements, 'unless the same shall be redeemed as is provided in this 'chapter; and such sheriff or other officer shall, within 'ten days from such sale, file in the office of the recorder 'of the county a duplicate of such certificate, signed by 'him; and such certificate or a certified copy thereof 'shall be taken and deemed evidence of the facts therein 'contained.'

"R. S., 1845, chap. 57, sec. 12, p. 302.

"Gross' Statutes, 1868, p. 375.

"'SEC. 13. It shall be lawful for any defendant, his 'heirs, executors, administrators, or grantees, whose lands 'or tenements shall be sold by virtue of any execution, 'within twelve months from such sale, to redeem such 'lands or tenements by paying to the purchaser thereof, 'his executors, administrators, or assigns, or to the sheriff 'or other officer who sold the same, for the benefit of such 'purchaser, the sum of money which may have been paid 'on the purchase thereof, or the amount given or bid, if

'purchased by the plaintiff in the execution, together with 'interest thereon at the rate of ten per centum from the 'time of such sale; and on such sum being made, as afore-'said, the said sale, and the certificate thereupon granted, 'shall be null and void.'

"R. S., 1845, chap. 57, sec. 13, p. 302.

"Gross' Statutes, 1868, p. 376.

"Sec. 14 gives fifteen months' redemption to creditors, and, together with sec. 15, prescribes the mode of procedure. Secs. 16, 17, 18, 19, *et seq.*, relate to the same subject, and sec. 22 provides for the issuance of a deed upon expiration of the time to redeem.

"Sec. 24 is as follows: 'In all cases hereafter, where 'lands shall be sold under and by virtue of *any decree of a 'court of equity, for the sale of* mortgaged lands, it shall be 'lawful for the mortgagor of such lands, his heirs, execu-'tors, administrators, or grantees, to redeem the same in the 'manner prescribed in this chapter for the redemption of 'lands sold by virtue of executions issued upon judgments 'at common law, and judgment creditors may redeem lands '*sold under any such decree*, in the same manner as is pre-'scribed for the redemption of lands, in like manner, sold 'upon executions issued upon judgments at common law.'

"R. Stat., 1845, chap. 57, sec. 24, p. 305.

"Gross' Statutes of 1868, p. 378.

"By sec. 2 of the 'Act to amend the 57th chap. of the 'Revised Statutes, entitled 'Judgments and Executions,'' passed in 1853, it is provided: 'In all cases of redemption of 'land from sale had under any attachment, judgment, order, '*or decree of proceeding thereunder*, it shall be the duty 'of the purchaser, sheriff, master in chancery, or other 'officer or person from whom said redemption takes place, 'to make out an instrument in writing, under his hand and 'seal, evidencing said redemption, which shall be recorded

'in the recorder's office of the proper county, in manner as 'other writings affecting the title to real estate are filed 'and recorded, and which recording shall be paid for by 'the party redeeming.'

"Laws of 1853, p. 229.

"Gross' Statutes, 1868, p. 379.

"The 16th sec. of chap. 77 of the Revised Statutes of 1874 reads thus:

"'Where any real estate is sold by virtue of an execu-'tion, judgment, or *decree of foreclosure of mortgage*, or 'enforcement of mechanic's lien, or vendor's lien, or for 'the payment of money, it shall be the duty of the sheriff, '*master in chancery*, or other officer, instead of executing 'a deed for the premises sold, to give to the purchaser a 'certificate describing the premises purchased by him, 'showing the amount paid therefor; or, if purchased by 'the person in whose favor the execution or decree is, the 'amount of his bid, the time when the purchaser will be 'entitled to a deed, unless the premises shall be redeemed, 'as provided in the act.'

"Rev. Statutes, 1874, chap. 77, § 16, p. 596.

"Sec. 18 is as follows: 'Any defendant, his heirs, ad-'ministrators, assigns, or any person interested in the 'premises through or under the defendant, may, within 'twelve months from said sale, redeem the real estate so 'sold, by paying to the purchaser thereof, his executors, 'administrators, or assigns, or to the sheriff, or *master in 'chancery*, or other officer who sold the same, or his suc-'cessor in office, for the benefit of such purchaser, his 'executors, administrators, or assigns, the sum of money 'for which the premises were sold or bid off, with interest 'thereon at the rate of ten per centum per annum from 'the time of such sale, whereupon such sale or certificate 'shall be null and void.'

"R. S., 1874, chap. 77, § 18, p. 596.

"Sec. 19 provides for redemption certificate; section 20 gives fifteen months to judgment creditors to redeem, and section 21 *et seq.* treat of the same subject. Section 30 provides for the issuance of a deed upon the expiration of the time for redemption.

"It is said by this court in Clarke *vs.* Reyburn, 8 Wallace, 322: 'In this country, the proceeding in most of the 'States, and perhaps in all of them, is regulated by 'statute. The remedy thus provided when the mortgage 'is executed enters into the convention of the parties in 'so far that any change by legislative authority, which 'affects it substantially to the injury of the mortgagee, is 'held to be a law impairing the obligation of the contract 'within the meaning of the provision of the Constitution 'upon the subject,' and

"Bronson *vs.* Kinzie, 1 Howard, 311,

"Williamson *vs.* Doe, 7 Blackf., 13,

are cited.

"In Bronson *vs.* Kinzie, the mortgage was given at a time when redemption from sale on foreclosure decrees was not provided for by statute, and the court held that a subsequent act of the legislature, giving twelve months' redemption, and prohibiting sale from being made at less than two-thirds the appraised value, so altered the remedy as to impair the obligation of the contract.

"The court says: 'Mortgages made since the passage of 'these laws must undoubtedly be governed by them, for 'every State has the power to prescribe the legal and 'equitable obligations of a contract to be made and exe-'cuted within its jurisdiction. It may exempt any prop-'erty it thinks proper from sale, for the payment of a 'debt, and may impose such conditions and restrictions 'upon the creditors as its judgment and policy may dic-'tate. And all future contracts would be subject to such

'provisions, *and they would be obligatory upon the parties* '*in the courts of the United States* as well as in those of 'this State.'

"The mortgage in the case at bar contains the provision that upon default in payment 'this mortgage may be im-'mediately foreclosed to pay the same by said party of the 'second part, his heirs,' &c., or the party of the second part, his heirs, &c., may sell the same upon notice, together with the equity of redemption of the mortgagor (P. Rec., p. 92.)

"The mortgagee, Powell, elected to pursue the remedy of foreclosure by sale upon decree, and the remedy provided by existing laws, and which entered 'into the convention 'of the parties,' allowed to the mortgagor, and those claiming under him, twelve months in which to redeem from sale decreed.

"This bill is not a bill to carry into effect the power of sale, but is a bill simply for a decree of sale in foreclosure as if no power had been granted the mortgagor, and the direction in the decree is that the sale shall be according to 'the course and practice' of the court. It is not to be assumed that such 'course and practice' can override the statute and settled rules of property of the State of Illinois, or infringe upon the obligation of the contract between the parties, and hence it may be fairly argued that the decree is to be taken to mean a decree with the right of redemption, but authority is not lacking that the better practice is that the right should be expressly reserved and the master directed to issue a certificate according to the statute. The decree does not state that he shall execute his deed, but it would seem that a purchaser would in fact be led to believe that he could obtain such conveyance.

"Where redemption is prescribed by statute, the decree

must not direct the delivery of the deed until the prescribed period has expired.

"Jones *vs.* Gilman, 14 Wisconsin, 450.

"Rhinehart *vs.* Stevenson, 23 Ill., 524.

"The proper direction is to the officer to execute a certificate to the purchaser, and in case there is no redemption within the time allowed by law, to execute a deed.

"Russell *vs.* Jarvis, 15 Wis., 571.

"Walker *vs.* Jarvis, 16 Wis., 28.

"In Harlan *vs.* Smith (6 Cal., 173) a decree for a deed in disregard of the time limited for redemption was held erroneous, but might be amended.

"In Farrell *vs.* Parlier (50 Illinois, 274) the court held there was error in ordering a sale without redemption, and in Boester *vs.* Byrne, Administrator, (72 Ill., 466,) the court say: 'It is, lastly, assigned for error, that the decree 'is erroneous, because it decrees that all rights of all the 'defendants be foreclosed, and then orders the sale of the 'land, when it should have been that the mortgagor pay 'the amount found due, and in default of payment that 'the master sell the land, and if not redeemed then all the 'rights of the defendants be foreclosed. The mode sug-'gested would have been the more formal one, but such is, 'substantially, the decree as it is drawn. The statute pro-'vides for a redemption after a sale, and the decree is not 'to be construed as interfering with the statutory right of 'redemption after a sale.'

"The result of these cases would seem to be that the error of omitting the proper directions is not considered sufficient ground for reversal, but that the error may be corrected by a modification, or such expression of opinion by the appellate court as amounts to a direction as to the correct course to be pursued."

V.

If this court shall be of the opinion that the rule based on the inverse order of the alienation of the premises by the mortgagor and his alienees is a part of the *lex loci*, then the court below erred in the application of that rule to the facts of this case as established by the pleadings and the evidence.

The mortgagor, H. H. Walker, aliened all his equity of redemption in said land at one and the same time to S. J. Walker. (R., p. 94.) The north half of the tract mortgaged was released from the mortgage. The tract was subdivided into blocks, the south half constituting blocks 13, 14, 15, 16, 17, and 18. S. J. Walker sold his equity of redemption in these six blocks—one block to one defendant, another to another, and so on at various times, and the pleadings and the evidence in the case establish the following facts and conclusions as to these several blocks:

And, First, as to Block 13.

Four defendants set up claims to this block—Abner Taylor, Levi Abt, Coolbaugh, and Powers, and the abstract of title admitted in evidence shows that Bryan Philpot, as the first vendee of Samuel J. Walker, is in fact the real owner.

The bill of complaint is taken for confessed against Bryan Philpot. (R., p. 42.) The plaintiff Powell claims the right to subject block 13, among others, to the satisfaction of his mortgage, and the defendant Philpot, by not answering his bill, admits this right. His right is therefore complete, so far as the defendant Philpot is concerned, without regard to the time of his purchase of said block from said Walker, or whether he was the first or last purchaser from said Walker of any piece of the property subject to the Powell mortgage.

Levi Abt claims in his answer, (R., p. 18,) to hold a promissory note made by defendant, Philpot, for $8,750.00, secured by a trust-deed on block 13, made by said Philpot to John G. Rogers, trustee, dated September 10, 1870, and recorded October 31, 1870. This deed does not appear in the abstract of title.

The defendant Abt claims title through his co-defendant John G. Rogers. He is therefore bound by the allegations of the answer of said Rogers.

"The rule that the answer of one defendant cannot be "read in evidence against his co-defendant does not apply "where the latter claims through him whose answer is "offered in evidence."

1 Greenleaf's Evidence, 178.

In the case of Osborne *vs.* Bank of the United States, (9 Wheaton, 738,) Chief-Justice Marshall, in delivering the opinion of the court, said:

"In inquiry whether the proofs or admissions in the case "be sufficient to charge Sullivan, the court will look into "the answer of Curry as well as into that of Sullivan. In "objection to this course it is said that the answer of one "defendant cannot be read against another. This is gener-"ally, but not universally true; where one defendant suc-"ceeds to another, so that the right of the one devolves on "the other, and they become privies in estate, the rule is not "admitted to apply. Thus, if an ancestor die, and such of "the proceedings be revived against his heir, or if the suit "be revived against an executor or administrator, the an-"swer of the deceased person, or any other evidence estab-"lishing any fact against him, might be read also against "the person who succeeds him. As a *pendente lite* pur-"chaser is bound by the decree, without being even made a "party to the suit, *a fortiori*, he would, without being made "a party, be bound by the testimony taken against the "vendor."

To the same effect are the following authorities:

1 Daniels' Chancery, 842, *n.* 4.
Field *vs.* Holland, 6 Cranch, 8.
Clark's Executors *vs.* Reimsdyk, 9 Cranch, 153.
Christie *vs.* Bishop, 1 Barber's Ch., 105.

Now Rogers says in his answer that "he has no knowledge of the matter or things set forth in said bill, except "as he is informed thereof by said bill; * * * * * "that he has no knowledge of said trust; has never been "advised thereof so far as he knows or believes, and has "never accepted it." And according to the authorities above cited, this, as a pleading, is evidence against defendant Abt, and the record, p. 55, shows that it was actually given in evidence by the complainant. The master certifies "that *all* the papers filed in said cause were produced in "evidence before him."

The answer of Rogers shows conclusively that the trust deed on which Abt rests his claim *was never delivered.*

It is, therefore, an absolute nullity.

A mortgage, like any other deed, to be valid and operative must not only be signed and sealed, but it must be delivered.

Freeman *vs.* Peay, 23 Ark., 439.
Foster *vs.* Beardsley, 47th Barber, 505.
Hood *vs.* Brown, 2 Oh., 266.

The act of registering a deed is not equivalent to the delivery of it.

Wiggins *vs.* Lusk, 12 Illinois, 132.
Maynard *vs.* Maynard, 10 Mass., 456.
Harrison *vs.* Phillips' Academy, 12 Mass., 456.
Elsey *vs.* Metcalf, 1 Denio, 323.
Hayes *vs.* Davis, 18 New Hampshire, 600.
Darr *vs.* Hoxie, 5 Mass., 60.

Baker *vs.* Haskell, 47 New Hampshire, 479.
Derry Bank *vs.* Webster, 44 New Hampshire, 264.
Parmellee *vs.* Simpson, 5 Wallace, 81.

In the case last quoted, Mr. Justice Davis, in delivering the opinion of the court, says: "The placing of the deed "on record was but his own act, and done without the "assent of Simpson. Under this state of facts there was "manifestly no delivery. The execution and registration "of a deed and delivery of it to the register for that pur-"pose does not vest the title in the grantee."

In the case of Young *vs.* Guilbeau, (3 Wal., 641,) Justice Field, in delivering the opinion of the court, said: "The deliv-"ery of a deed is essential to the transfer of the title. It is "the final act, without which all other formalities are inef-"fectual. To constitute such a delivery the grantor must "part with the possession of the deed or the right to retain it. "Its registry by him is entitled to great consideration upon "this point, and might perhaps justify in the absence of "opposing evidence a presumption of delivery, but here "any such presumption is repelled by attendant and sub-"sequent circumstances. Here the registry was of course "made without the assent of the grantee, as he had no "knowledge of the existence of the deed."

In the case of Jackson *vs.* Fipps, (12 Johnson, 421,) Mr. Justice Spencer, in delivering the opinion of the court, said:

"The facts are that in the fall of 1808 it was agreed "between Joseph and Aaron Fipps that the former, who "was indebted to the latter, should give him a deed of "his farm to secure the debt; that Joseph executed the "deed, acknowledged and carried it to the clerk's office for "record on the day of its date, without the grantee or any "person on his behalf being present or receiving a de-"livery of the same; that Aaron, the grantee, died in the

" fall of 1809, and in February, 1810, the defendant received
" said deed as the son, and, probably, heir of Aaron.

" Under these circumstances the deed must be consid-
" ered inoperative. It is requisite in every well made deed
" that there be a delivery of it. * * * * It would be
" an absurdity to hold that a thing was delivered when
" there was no person to receive it."

The only proof made of the indebtedness by defendant, Abt, is by an alleged copy of a promissory note offered in evidence by the president of a bank, who states that the *original* note is in his bank. (R., p. 58.)

The claim of defendant, Abt, must therefore fail: first, for lack of proper evidence to establish the indebtedness; second, because the alleged trust deed was never delivered.

The abstract of title shows a deed from Walker to Coolbaugh and Powers of block 13. That deed was given to them by Walker, who then had no interest in said block, he having previously sold all his interest therein to Philpot, whose deed was then on record; and the defendants, Coolbaugh and Powers, in their answer do not even question the legality or validity of the Philpot deed. This claim, therefore, to said block 13, falls to the ground.

The defendant, Abner Taylor, in his answer (R., p. 28) claims a lien on block 13 by virtue of a judgment recovered by him against said Philpot, April 4, 1874. A replication to this answer was filed, (R., p. 39,) and no evidence whatever was produced to establish the claim. This claim is, therefore, not sustained, and the whole of block 13 is therefore left by the pleadings, the evidence, and the law, subject to sale in satisfaction of the Powell mortgage the same as if it still remained in the hands of the original mortgagor.

It stands precisely as the whole six blocks subject to the Powell mortgage would have stood if all these defendants, after being served with process, had failed to enter an ap-

pearance, and had let the bill be taken against them for confessed. In that case the proper decree would have been for the sale of the whole six blocks, or so much thereof as might be necessary, reserving to the defendants the statutory right of redemption.

No claimant to this block having established an interest therein, a decree similar to that above described should have been passed relative to it.

Block 14.

To block fourteen there is but one claimant, the defendant, S. A. Ricker, who holds it by deed from S. J. Walker, dated February 25, 1873, and recorded April 5, 1873.

Block 15.

The evidence shows that block fifteen is owned by the defendant, J. Brennock, by deed from P. Brennock, to whom S. J. Walker conveyed it by deed dated March 8, 1872, and recorded October 10, 1872, subject to deed of trust to Hoffman dated September 26, 1870, and recorded September 29, 1870, to secure payment for a promissory note now held by the defendant, the International Bank, for ten thousand dollars. (R., p. 24.)

The South 100 Feet of Block 16.

The abstract of title shows that the equity of redemption of S. J. Walker in the south 100 feet of block 16 became vested in John D. Kinney on the 2d day of December, 1872, by deed from said Walker to said Kinney, that day recorded, (R., p. 63,) the debt secured by the Wheeler trust-deed having previously been paid, (R., p. 63,) but the trust-deed securing it was then, and still is, unreleased. The effect of the subsequent transactions of Kinney, Orvis, and

the Walkers was to transfer the title thus acquired by Kinney direct to Orvis. Walker, while having no interest in block 16, sells it to Orvis by contract, February 26, 1874, calling for a warranted deed, which said contract was placed on record the same day; and also the warrantee deed called for by the contract was, on the same day, executed and delivered. On the 6th day of March following Walker procures the title from Kinney. This vested nothing in Walker, but vested the title in Orvis and in Orvis' vendees. Orvis, therefore, stands in the shoes of Kinney, and takes his estate from the Walkers as of December 2, 1872. During these last transactions the land records do not show at any time any title in Walker as to this south 100 feet, Orvis' contract having been placed on record before Kenney's deed to H. H. Walker was made, it having been dated March 6, 1874, and recorded on the 16th of the same month. But as against the complainant, the answer of Orvis' co-defendants, Greenebaum and Forman, is evidence both for Greenebaum and Orvis; first, because no replication to that answer was filed by the complainant; second, because the complainant himself produced it in evidence as shown by the Record, page 55, (Daniels' Chancery, 841, *n.* 7.) Greenebaum and Forman in their answer (Rec., p. 23,) alleged that "Samuel J. Walker became the "owner of the entire tract of land so conveyed under said "mortgage, and that the following portion of said tract has "been sold and conveyed by said Samuel J. Walker *sub-*"*sequent* to the execution, delivery, and filing for record of "the said trust-deed of said Orvis unto said defendant "Greenebaum, viz: lots 13, 14, 15, 17, and 18, in said "Packard subdivision."

Now, whatever may be the actual facts in relation to the time of sale of these several blocks thus enumerated the complainant has admitted these allegations to be true by

filing no replication to the answer, and has, moreover, made it evidence by producing it as such himself. (R., p. 55.) He is therefore estopped from demanding the sale of any part of block 16 until after the other five blocks above enumerated shall have been subjected to sale in satisfaction of his mortgage. If his case, as made out against the owners of those five blocks, will not enable him to sell them, or either of them, until after block 16 shall have been subjected to his mortgage, the complainant simply finds himself in the case of a mortgagee who, under the inverse order rule, has released a portion of the premises covered by his mortgage, with actual notice that other portions of the same tract covered by his mortgage had been previously sold to other parties by the mortgagor. He has simply to deduct from his mortgage the value of the property thus released by him before he can proceed to subject to his mortgage any portion of the mortgaged premises previously sold.

North 201 Feet of Block 16.

The abstract of title shows that the equity of redemption of S. J. Walker in the north 201 feet of block 16 became vested in John D. Kinney on the 2d day of December, 1872, the debt secured by the Wheeler trust deed having been previously paid, as appears from the evidence. (Record, page 63.) Complainant has thrown himself out of court in relation to this 201 feet of block 16, as shown in the comments in relation to the south 100 feet of said block.

Block 17.

The abstract of title shows that the Walkers parted with all interest in block 17 to Ralston, October 2, 1871, by deed recorded September 4, 1872.

BLOCK 18.

According to the abstract of title, S. J. Walker parted with his equity of redemption in block 18 to Coolbaugh and Powers on July 1, 1872, by deed, which was recorded December 7, 1872, said block being then, according to said abstract, subject, first, to the Powell mortgage, and, second, to the Wheeler trust. The evidence that S. J. Walker continued to be the owner of block 18, from first to last, is conclusive, notwithstanding the deed to Coolbaugh and Powers. First, he treated it as his own, with the concurrence both of Coolbaugh and Powers, (see contract, Record, page 81.) Second, S. J. Walker was asked the question, "What portion of those blocks, (re- "ferring to blocks 13, 14, 16, and 18,) still subject to the "Powell lien, are held by any other persons other than "Henry H. and Samuel J. Walker, in trust for, or for the "benefit of, either of the Walkers?" Answer: "I sup- "pose you consider the property held by Mr. Coolbaugh in "trust for myself. I did make a sale of this property at "one time—the property named there—but Messrs. Cool- "baugh and Powers afterwards cancelled the sale and "agreed to take it back, and let them hold the title for "the money advanced by them, if there was any money "due to them—if there was any money due to Mr. Cool- "baugh or the bank." (Record, pages 65 and 66.) By stipulation, page 54, Coolbaugh and Powers adopt the cross-bill of Ricker as a part of their answer to the cross-bill of Orvis, one allegation of which is as follows:

"And your orator respectfully says unto your Honors "that said half (referring to the south half) of said block "18 (a particular description of which he is up to this "time unable to give) is first liable for the payment of "said mortgage deed, before the property of your orator "can be charged therewith."

According to the abstract of title, block 18 appears to be subject to the deed of trust from Picket to Wheeler.

The defendants, Symmons and Pratt, assignees in bankruptcy, claim in their answer to be the beneficiaries under this deed of trust. The complainant's bill was taken for confessed against Wheeler.

Block 18 having thus been shown to belong to Walker as late as September 3, 1874—two months after the filing of the bill—the decree should have provided for its sale before either of blocks 14, 15, 16, or 17; but, instead, the court below committed the gross error of holding the proceeds of a sale of land made after the filing of the bill subject to the Powell mortgage, by reason of the sale being the last made by Walker; and further provided that in case the Powell mortgage should fail to be satisfied out of said proceeds of sale, then the same land should be sold, not as belonging to Walker when the bill was filed, but as belonging to Coolbaugh and Powers. And a similar gross error is found in the decree relating to the north 201 feet of block 16, and the proceeds of the sale thereof to the defendant, Flanagan.

VI.

The court below erred in dismissing the cross-bill of Emerson G. Orvis.

Orvis obtained leave of the court and the consent of Powell, the complainant in the original bill, to the filing of his cross-bill. (Rec., pp. 51, 53.) It was dismissed, so says the record, for want of equity. (Rec., p. 88.)

It was filed for discovery and for relief. Under it the sale of the south half of block 18 to Tillinghast was finally proved by competent evidence—a fact of great importance in the case.

The court evidently supposed this fact had been estab-

lished under the Ricker cross-bill, filed March 5, 1875—no party to which, save its plaintiff, was a party to the original bill, no party was served with process, no answer was filed, and no appearance was entered. It was taken for confessed against no one, the allegation in the decree to the contrary notwithstanding, (Rec., p. 86,) as a decree *pro confesso*, presupposes some kind of process served on the defendants, or appearance entered and not followed by an answer, and if such a decree had been passed the record would show it.

But the master's report shows that he was going through the form of taking evidence under the Ricker cross-bill on the 6th day of March, 1875, the next day after it was filed. (Rec., p. 56.) Thus the record shows conclusively that no fact was established by the Ricker cross-bill, or by any proceedings thereunder.

The Orvis cross-bill was answered by a stipulation that the answer of Coolbaugh and Powers to the original bill, together with the cross-bill of Ricker, should stand for and be regarded as the answer of Coolbaugh, Powers, and Ricker to the cross-bill of E. G. Orvis, and the testimony taken under the Ricker cross-bill should be regarded as if taken in the cross-bill of Orvis. Aside from this stipulation, the matter taken as evidence under the Ricker cross-bill is not evidence in the case; and this stipulation does not make it evidence under the Ricker cross-bill, but under the Orvis cross-bill. Thus whatever legitimate service the Ricker cross-bill can perform in the case is under this stipulation, as evidence under the Orvis cross-bill.

This cross-bill prayed for the discovery of a very important fact in the case, and under it the discovery was obtained, and a portion of the final decree of the court was based on this discovery. The court therefore erred in dismissing this cross-bill. But the decree says it was dismissed "for want of equity." To this we say that it is

not necessary to the maintenance of a cross-bill that it should make out such a case as would support the equity jurisdiction in an original bill, and on this point all authorities are agreed.

VII.

The court below erred in considering as a part of the case any part of the master's report save the evidence reported by the master, and his certificate relating to said evidence.

The order under which the cause was referred to the master reads as follows, (R., p. 42:) "That on motion of "complainant, by his solicitor, it is ordered by the court "that this cause be referred to Henry W. Bishop, Esq., "master in chancery of this court, to take proofs herein "and report the same to the court."

What was the master's duty under this order? It is found in the order itself and not elsewhere, "to take proofs "and *report the same* to the court." All beyond this done by the master was simply null and void.

The law upon this point as laid down in Daniels' Chancery, page 1296, is as follows: "The master, however, must "not go beyond the matters referred to him; and it is laid "down in one of Lord Bacon's orders that if a master re- "port as to matter which is not referred to him, his report, "so far as it relates to that matter, is a nullity," and the following authorities are referred to: White *vs.* Walker, 5 Florida, 478; Gordon *vs.* Hobart, 2 Story, 243; Levert *vs.* Redwood, 9 Porter, 79; Harris *vs.* Fly, 7 Paige, 421.

In the last case Chancellor Walworth says: "The ref- "erence to a master previous to the hearing to compute "the amount due to the mortgagee and to prior encum- "brancers is only authorized to be entered where the rights

" of the complainant as stated in the bill are admitted by " the answer. Where the defendants, therefore, by their " answer, set up a claim of priority which is adverse to the " claim of the complainant as made by his bill, the master " is not authorized to settle the question of priority. If he " makes any report whatever on the subject of such claim, " therefore, he should merely ascertain the amount due " upon the supposition that the claim of priority made by " the answer is well founded, leaving it for the court upon " the hearing to decide the question as to the legal or " equitable rights of the defendants upon the facts stated " in their answer. The report of the master in deciding " the question that the legacies were not a lien upon the " estate devised was not authorized by the order of ref- " erence, and must be laid entirely out of the question " in deciding this cause upon the bill and answers."

VIII.

The court below erred in confirming, on the 8th of April, any part of the master's report *nisi* or absolutely.

The master's report was filed on the 27th day of March, 1875. (R., p. 54.) On Thursday, the 8th day of April following, the court passed the following order, to wit, (R., p. 84:) "On motion of complainant's solicitor, it is " ordered by the court that the report of Henry W. Bishop, " Esq., master in chancery, of the amount due the com- " plainant herein, heretofore filed in this cause, be ratified, " unless cause be shown to the contrary by Monday morn- " ing next."

This order simply deprived the defendants of the rights secured to them by the 83d equity rule prescribed by this honorable court, which gives all parties thirty days in which to file exceptions to the master's report. So, even

No 35 N. H. S.

Supreme Court of the United States.

October Term, 1877.

No. 288.

EMERSON G. ORVIS,

APPELLANT,

vs.

NATHAN POWELL,

APPELLEE.

SUPPLEMENTAL BRIEF

In behalf of Appellant, and of John P. Squires, one of the Defendants.

B. F. BUTLER,
O. D. BARRETT,
of Counsel.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1878.

Supreme Court of the United States.

EMERSON G. ORVIS, Appellant,

vs.

NATHAN POWELL, Appellee.

Reply to the Brief of A. M. Pence, Esq.

SALES IN INVERSE ORDER OF ALIENATION.

Mr. Pence alleges (p. 1) that the amount found due under the mortgage is admitted. This is a mistake as to appellant. (See first brief, p. 12.)

On page 2 Mr. Pence has assigned block 16 to the fourth place in the order of sale, setting forth the fact that Kinney's deed of said block was recorded December 2, 1872. On the next page he assigns blocks 13 and 18 to the fifth place in the order of sale, and shows that Coolbaugh and Powers' deed of those was recorded five days later than Kinney's deed, to wit, on December 7, 1872. Mr. Pence has been led into this mistake by the master's report, and by the decree of the court below, both of which as to these blocks follow the direct instead of the *inverse* order of alienation by the mortgagor.

In assigning block 13 to the fifth place, together with

block 18, Mr. Pence, the master, and the court overlooked the deed of this block to Philpot, recorded two years before.

On page 3 we are informed that the title was held indifferently by H. H. and S. J. Walker. H. H. Walker made but one transfer to S. J. Walker, and S. J. Walker, at a time when he had no interest in block 16, quit-claimed it back to H. H. Walker, and these are all the transfers between them shown by the record.

On the same page Mr. Pence says:

"We admit the law to be that a court of equity, when a proper case is made, will order premises sold in the inverse order of alienation upon a bill to foreclose a mortgage," and adds "that it requires a cross-bill filed for that purpose by one defendant against all the others interested."

Mr. Pence claims the inverse order rule to be a part of the *lex loci*. We deny it, and on this point refer to first brief, p. 14.

But assuming that it is a part of the *lex loci*, and also assuming that Orvis derived his title from H. H. Walker, whose deed he took on the 26th day of February, 1874, instead of deriving it from Kinney, in whom the title was vested on the said 26th day of February, 1874, still the appellees are in error in supposing that the Orvis lot is to take its place in the order of sale under the Powell mortgage where it would, if S. J. Walker had continued to own it up to February 26, 1874, and had then sold it to Orvis.

This results from the fact that H. H. Walker, the mortgagor, sold the mortgaged premises to S. J. Walker in 1870, not with warranty but by quit-claim deed, and subject to the Powell mortgage, the payment of which was assumed by S. J. Walker, as shown both by his evidence (R., p. 70) and by the Powell mortgage, which shows that

S. J. Walker signed the note secured by the mortgage; and this being recorded, was notice to all parties.

This being so, the re-purchase of block 16 by H. H. Walker does not in any manner change the order in which said block would otherwise be subject to the Powell mortgage.

This follows, as a necessary consequence, from the rule of law that would place block 16, last on the list, subject to sale under the Powell mortgage, in case its ownership had remained in H. H. Walker, after selling the balance of the mortgaged premises to S. J. Walker on the same terms and conditions of the sale made to him in 1870.

The decisions of the courts upon this point are numerous, and all to the same effect. Among them are the following: Chapman *vs.* Beardsley, 3 Connecticut, 115; Engle *vs.* Haines, 1 Halsted Chancery, 192; Ferris *vs.* Crawford, 2 Denio, p. 595; and Mason *vs.* Payne, 1 Walker's Chancery, 459.

In the case of Chapman *vs.* Beardsley, it appears that Beardsley, owning three tracts, mortgaged them to a saving's bank, and then conveyed two of the tracts to Barker, Barker agreeing to assume and pay the mortgage debt. Afterwards, Barker conveyed the two tracts he had thus purchased to Page, and Page to Chapman, all having full knowledge of the facts and agreement between Beardsley and Barker. Chapman paid the mortgaged debt, and then sought to collect the note out of Beardsley, foreclosing the mortgage of the tract retained by him. The court held that Beardsley's vendees became the principal debtors to the bank, leaving Beardsley a surety simply, and as a surety he could at any time have paid the bank and foreclosed the two tracts held by his own vendees.

In the case of Engle *vs.* Haines, Chancellor Halsted, in delivering the opinion of the court, said:

"If a mortgagor subsequently to the mortgage sells and conveys a part of the mortgaged premises, an equity arises in favor of the purchaser, to have the part of the mortgaged premises which remain in the mortgagor first sold for or towards the payment of the mortgage, but if such subsequent purchaser agrees with the mortgagor that the part he buys shall be subject to the mortgage, and that the amount due on the mortgage shall be a part of the consideration for the portion he buys, equity will not interpose to protect him by subjecting the part of the mortgaged premises remaining in the mortgagor to be first sold. A subsequent purchaser of such portion from the grantee of the mortgagor with notice of the facts has no better equity against the mortgagor than the first purchaser."

In the case of Caruthers *vs.* Hall, a bill was filed to foreclose a mortgage made by Johnson. Hall, a subsequent purchaser, answered, showing that the mortgagor had conveyed a part of the mortgaged premises to Redson, subject to the entire mortgage which the deed declared she was to pay, and that his own purchase was made subsequently. The court held that the portion as to Redson should be first offered, and that Hall's portion should only be resorted to in case of deficiency, and that it was not necessary for Hall to file a cross-bill.

Our claim is that Orvis does not derive his title from H. H. Walker, but derives it from Kinney, who owned the lot when H. H. Walker deeded it to Orvis, and who subsequently deeded it to H. H. Walker, by which deed it vested at once in Kinney. But if in this we are mistaken, then we claim the rule of law to be as above set forth, that even had Kinney conveyed to H. H. Walker the Orvis lot before H. H. Walker gave a deed of it to Orvis, still the lot would be subject to sale under the Powell mortgage in the same order and under the same conditions it would have been had Kinney sold and deeded it direct to Orvis. In other

words, Orvis stands in Kinney's shoes, whether he derives his title from Kinney or from H. H. Walker.

CROSS-BILLS.

The learned counsel seem to be of the opinion that persons not parties to the original suit can be brought in by a cross-bill.

This court said, in the case of Shields *vs.* Barrow, (17 H., p. 145,) "new parties cannot be introduced into a cause by a cross-bill. If the plaintiff desires to make new parties, he amends his bill and makes them. If the interest of the defendant requires their presence, he takes the objection of non-joinder, and the complainant is forced to amend or his bill is dismissed. If at the hearing the court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject, and a cross-bill to make new parties is not only improper and irregular, but wholly unnecessary."

This is simply a statement, remarkably well made, of what the law has been since equity practice commenced.

DECREES BETWEEN CO-DEFENDANTS.

The law is by this court equally as well stated as to what can be determined between co-defendants with antagonistic interests.

In the case of Corcoran *vs.* the Chesapeake and Ohio Canal Company, (4 Otto, 741,) Mr. Justice Miller, in delivering the opinion of the court, stated the law on this point as follows:

"It has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as

far as it affects the rights presented to the court, and passed upon by its decree. It is to be observed, also, that the very object of that suit was to determine the order of distribution of the net revenue of the canal company, and that the Corcoran trustees were made defendants for no other purpose than that they might be bound by that decree. And, lastly, as the decree did undoubtedly dispose of that question, its conclusiveness cannot now be assailed collaterally on a question of pleading, when it is clear that the issue was fairly made, and was argued by Corcoran's counsel, as is shown by the third head of their brief, made a part of this record by stipulation. * * *

"It seems to us very clear that the question we are now called on to decide has been already decided by a court of competent jurisdiction, which had before it the parties to the present suit; that it was decided on an issue properly raised, to which issue both complainant and defendant here were parties, and in which the appellant here was actually heard by his own counsel; and that it therefore falls within the statutory rule of law which makes such a decision final and conclusive between the parties, and that none of the exceptions to that rule exist in this case."

And the decree referred to was not based on any cross-bill.

We now call your Honors' attention to the law as laid down in Field *et al. vs.* Holland *et al.*, (6 Cranch, 8.)

Chief-Justice Marshall, in delivering the opinion, used the following language: "The situation of Cox is different; though nominally a defendant, he is substantially a plaintiff. Their interest is his interest, their object is his object. He, as well as the plaintiff, endeavors to show that the judgments were satisfied. He is not to be considered as really a defendant, nor does the bill charge him with colluding to defraud the plaintiffs, or require him to answer the charge of contributing to the imposition alleged to have been practised on them. It is not in the power of the plaintiffs in such a case to avail themselves

of the answer of a party who is in reality, though not in form, a plaintiff."

But we will go back to an old case, and show that we are making no new principle of equity; nothing that would be a surprise to anybody. We read from Chamley *vs.* Lord Dunsany *et al.*, (2 Schoals and Lefroy.) This is a leading case. It was an Irish appeal, and it seems that nobody but Irishmen could blunder in chancery as fearfully as these parties have blundered. The question was, what was the condition of co-defendants. A decree had been made between the defendants, and they came forward and said that that could not be done.

We now read from the opinion of Lord Eldon, delivered before the House of Lords, in that cause, (found on page 718:)

"It is said that a decree is made between defendants, and that such is contrary to the practice of a court of equity, because there cannot be a cross-examination between co-defendants. I dwell on this objection because it has been made by the Solicitor-General, whose arguments are entitled to the very highest respect. Whatever he says must have considerable weight with this House, and with no member of it more than with myself, who have had such opportunities of learning the extent of his talents. But, my lords, where a case is made out between defendants by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants. Further, my lords, a court of equity is bound to do so. The defendant chargeable has a right to do so. The defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter that may be then decided between him and his co-defendant. And the co-defendant may insist that he shall not be obliged to institute another suit for a matter that may then be adjusted between the defendants. And if a court of equity refuse so to decree, it would be a good cause of appeal by either defendant."

Not only bound, but when you get matters on the record *inter-parties*, whatever may be their relations to each other, whether as defendants or plaintiffs, or plaintiffs or defendants, in an equity suit, where the whole matter may be litigated as it could be here, there the rule is inevitable and universal.

Lord Redesdale, in the same case, says, (p. 710:)

"But it seems strange to object to a decree because it is between co-defendants, when it is grounded on evidence between plaintiffs and defendants. It is a jurisdiction long settled and acted on, and the constant practice of a court of equity—so much so that it is quite unnecessary to state any case in its support."

Lord Chancellor Erskine, in the same case, speaking of the objection raised that the account between the co-defendants was not rendered, said, (p. 720:)

"The conduct of the appellant, in making that objection here, is like that of a party who would seek to set aside a verdict because evidence was not given to the jury which he had in his power at the trial and would not give. My lords, I will not attempt to add to the reasoning of the two noble and learned lords who have taken the pains of going through the entire of this case. I concur with them in every position they have laid down."

Here, may it please your Honors, is another case to show that the law is the same down to the present hour. It is in a publication called the Law and Equity Reporter, vol. 3, p. 362. It will be in the next volume of the New York reports.

A former decree between co-defendants was pleaded as an estoppel in a bankruptcy case. It was held "that although the judgment was in a court of equity, and both the parties to this action were defendants therein, the estoppel was effective."

EXCEPTIONS TO MASTER'S REPORT.

Mr. Pence makes the point (p. 7) that the appellant Orvis did not file any exceptions to the master's report, and therefore is not permitted to appeal from the decree passed below.

It is evident both from the exceptions filed by the defendant Ricker to the master's report, and by the order sustaining the first of said exceptions, that the master reported block 14 as "first liable to sale under said mortgage." (R., p. 83.)

If the final decree had followed the order of sale indicated in the master's report, the Orvis lot would have escaped the Powell mortgage. It certainly was not necessary for Orvis to except to a master's report in his favor in order to entitle him to appeal from the final decree of the court changing, reforming, or reversing the master's report.

WALKER THE REAL OWNER OF BLOCK EIGHTEEN.

Section fourth of Mr. Pence's brief is an effort to convince the court that S. J. Walker had no interest in block 18. In this effort Mr. Pence has permitted a few mistakes to appear in this statement, among which are the following: Mr. Pence says (page 11) that "Walker has not signed the contract with Mrs. Tillinghast." We turn to the record, page 83, and find that the last name appended to that contract is that of Samuel J. Walker, to which the seal is added. Mr. Pence also says that Mr. Walker was in no manner a party to said contract. We turn to the contract and find that W. F. Coolbaugh, and Heman G. Powers, and *Samuel J. Walker* are the parties of the first part. On page 8, Mr. Pence states that Walker sold the south half of block 18 to D. W. Tillinghast. We turn to the

contract and find the fact to be that on or about the 9th day of February, 1874, "Samuel J. Walker contracted with Daniel W. Tillinghast aforesaid to sell to his wife, Louisa M. Tillinghast, the aforesaid south half of block 18," &c. Mr. Pence states that Mr. D. W. Tillinghast went into possession and proceeded in good faith to erect buildings. We turn to the contract and find that it was Mrs. Louisa M. Tillinghast that went into possession and proceeded to erect buildings. Mr. Pence states that the original contract was entered into on the 9th of February. We turn to the record, and find that negotiations commenced at about that time, and that they were not concluded at the time of the death of D. W. Tillinghast in the following April; that a written form of a contract had been prepared, but had not been signed. Mr. Pence says (page 11) "Walker was to get nothing."

We turn to the contract and find that the proceeds of the sale were to be applied in part, if not all, towards the payment of notes signed by S. J. Walker. Mr. Pence says (p. 12) that Tillinghast was in possession, and that no one will dispute that notice by possession is just as good as notice by the record. Possession is sometimes notice to a purchaser when it is the possession of the identical tract purchased, but possession of black 18 is no notice to one purchasing block 16, and possession of vacant land is of itself notice to no one. But it would be useless to point out all of the mistakes contained in this section. Mr. Pence being mistaken in his premises, naturally comes to a mistaken conclusion as to the ownership of block 18.

Ricker, in his cross-bill, (Rec., p. 50,) says that the south half of said block 18 is liable for the payment of said mortgaged debt before the property of your orator can be charged therewith. And Coolbaugh and Powers adopt this very cross-bill as part of their answer to the cross-bill of

Orvis, thereby acknowledging that the south half of block 18 is liable to sale prior to block 14.

The abstract of title shows that S. J. Walker was the actual owner of block 14 long after he deeded block 18 to Coolbaugh and Powers. Coolbaugh and Powers, by adopting the cross-bill of Ricker, say in effect that S. J. Walker was the owner of the south half of block 18 subsequent to the recording of Ricker's deed. They therefore admit that they were simply holding the title of block 18 for S. J. Walker.

So we have a case where Mr. Pence's clients admit the interest of Walker in block 18, while Mr. Pence in the face of this admission denies it. Which shall we believe: the client whose statements harmonize with all the other facts of the case, or his counsel, who, upon this subject, has been inaccurate in his statements?

NON-JOINDER IN THE APPEAL.

Mr. Pence and Mr. Wilson put in the plea of non-joinder in the appeal as a ground for dismissing the same.

This is a suit in which each defendant had arrayed against him not only the plaintiff, but also the other defendants. It is a case in which the defendants all held in severalty; a case in which it was competent for Powell to bring his suit alone against either one of the defendants; a case in which, in fact, there are no joint interests; a case in which the decree might have been executed long ago against each one not appealing, and a case in which it does not follow that because the plaintiff might fail in getting a decree against one defendant that he must of necessity have a decree against some other defendant.

It is a case in which it was possible for the plaintiff to so manage his pleadings, and so blunder in putting in his

evidence, as to render it impossible for a court to give him a decree against either one of the defendants. There being no one having joint interest with Orvis, or having an interest co-extensive with his in part or in whole, there was no possible necessity for his asking the other defendants to join with him in the appeal, or summon them before the lower court to show cause why he should not be privileged to appeal.

B. F. BUTLER,
O. D. BARRETT.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1878.

EMERSON G. ORVIS,

Appellant,

vs.

NATHAN POWELL et al.,

Appellees.

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ARGUMENT OF EDWARD S. ISHAM,

ON BEHALF OF APPELLEES.

ISHAM & LINCOLN, Solicitors, &c.

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ARGUMENT.

It is now decided that state statutes giving right of redemption from sale under decrees in equity in foreclosure of mortgages are obligatory in the federal courts, and that if this rule conflicts in any degree with the principle that places the procedure and powers of the courts of the United States beyond the legislative interference of the states, the latter must to that extent give way. This having been determined in the case of *Brine* v. *The Hartford Fire Ins. Co.*, there is presented to those who have acquired title to land under decrees similar to the one in that case, the critical question: What is the consequence if a decree and the proceedings under it disregard the right given by the statute, and in terms purport to defeat it? Are decrees of this character, or is that part of them ordering this mode of sale, and the order confirming the sale when made, *erroneous* merely or are they technically *void*?

If they are void, then the sale and the deed of the master made by authority of them are void also, and the decree in foreclosure remains unexecuted. If their defect was error merely, then they simply failed to conclude the right of redemption from the sale. In such case a mortgagor may at any time within the limitation provided by law prosecute an appeal or bill of review and have the decree reversed for error. But if he does neither of these things, but sleeps upon his rights till the limitation upon proceedings in error has run, the decree and its execution must ripen into a bar through his acquiescence.

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In the *Brine* case but one question was discussed in argument, namely, the question whether the direction in the decree

to the master to sell according to the practice of the federal court was correct. And that depended upon another, namely, whether the state statute was binding on the federal court; whether the statute of redemption was a regulation of process, or a rule of property.

These questions were argued. The consequences of disregarding the statute, and of a misjudgment by the court upon that question, were *not* argued. But as the direction in the decree to pursue the special mode of sale was the radical error in that case, and the subsequent proceedings of the master and the court were but the carrying out of that erroneous order and must stand or fall with it, doubtless *the legal quality* of that part of the decree, as being, if incorrect, void altogether or *erroneous* merely was involved, and might properly have been argued except as it would have occupied the time of the court further than was imperatively necessary for the disposition of that cause. Accordingly expressions employed by the court in its opinion have created grave discussion concerning the view of this matter actually held by the court. On the one hand it is claimed that the part of the decree in question is absolutely void, and a suit has been in fact brought in the state court attacking the decree collaterally, and seeking an account of interest, rents, etc., and to redeem from a mortgage foreclosure in the federal court in a case where there has been a sale and confirmation of the sale by the court, and a deed, and where the period of two years fixed by the statutes of the United States as a limitation upon appeal or bill of review for error has expired. This bill to redeem is based upon the assumption that the decree in foreclosure was void. The judgment of the circuit court *dismissing the bill* has been affirmed on appeal in the appellate court, and the cause is now pending in the supreme court of Illinois.

In *The State* v. *Richmond*, 6 Foster, 240, the supreme court of New Hampshire said: "Matters which are properly *voidable*

are very commonly spoken of as *void*. * * * But the word *void* is so often used by good writers, and even by legal writers, in the sense of invalid, ineffectual or not binding, that it can hardly be said that this is not a correct and legitimate use of the term." "Irregularities, which is but another word for illegalities, in the proceedings in an action, furnish everywhere ground of exception to the party whose rights are affected by them, and the irregular proceedings are at once set aside on motion of the proper party. But it is a general rule that if a party who had ground to move the court to set aside any process or proceeding of any kind neglects to make his application in a reasonable time after the facts have come to his knowledge, he is deemed to waive the exception by the delay, and will be forever precluded to make the objection afterwards." In our view there seems to be nothing in the expressions employed by this court opposed to this view of the irregularity involved in these decrees; and that they are valid until reversed, and cannot be collaterally attacked seems to be well founded in principle and upon all authority.

In looking at their legal quality the first consideration by which we are met is the rule laid down by BULLER, N. P. 66, and not open to argument, that if the court rendering the decree, "had cognizance of the cause the judgment is only erroneous; but if the court had no jurisdiction, it is void." *Bigelow* v. *Forest*, 9 Wall. 351; *Buckmaster* v. *Carlin*, 3 Scam. 106.

This throws us back upon the questions: What is jurisdiction? and What was the jurisdiction of the court in the particular case and over the particular matter? Jurisdiction is "the power to hear and determine a cause." This is the definition approved by the supreme court of the United States, and by the supreme court of Illinois. *United States* v. *Arredondo et al.*, 6 Peters, 709; *Bush* v. *Hanson*, 70 Ill., 482. The question whether in a given case a court has jurisdistion, therefore, is the

question whether it has "power to hear and determine the cause." But this is a question arising at the threshold of a cause, not afterwards. It is whether the court had power to *enter upon the inquiry* presented. In *Reg.* v. *Bolton*, 1 Ad. & El., N. S., 74, LORD DENMAN said: "The question of jurisdiction is determinable *on the commencement*, not at the conclusion of the inquiry."

In *Britain* v. *Kinnard*, 1 B. & B., 432, where the question was one of a jurisdictional fact, a magistrate had authority under the Bum-boat act to seize and destroy certain boats, and the question was asked: Can the magistrate by calling a seventy-four gun ship a boat give himself jurisdiction and preclude evidence of "such excess of jurisdiction?" But the court answered in the judgment of RICHARDSON, J., so highly commended by Lord DENMAN: "Whether the vessel in question were a boat or no *was a fact on which the magistrate was to decide, and the fallacy lies in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction.*" Now, this was an action of trespass against a magistrate for seizing and convicting a decked vessel, which was, perhaps, not a boat at all within the meaning of the statute under which he proceeded. But the court held that whether the vessel was a boat or not was a question which he had to decide; that a wrong judgment was, therefore, not an excess of jurisdiction; that it was not void; and that until reversed on appeal or quashed on certiorari, it was conclusive to protect the magistrate.

This rule is expressly declared by the supreme court of Illinois in *The People* v. *Lieb*, 1 Ch. Law Jour., 147. In that case the court adopted the language in *Colton* v. *Beardsly*, 38 Barb. 51: "The test of jurisdiction in such cases is whether the tribunal has *power to enter upon* the inquiry, and not whether its conclusions in the course of it were right or wrong."

Now, when the jurisdiction of the cause is once established, when the tribunal is once clothed with the right to enter upon

the inquiry presented by the cause and to proceed therein at all, it is the *general rule*, (to its particular qualifications we will come presently,) that it has the power and right to decide every question which arises in the cause and its judgment, however erroneous, is not void, and cannot be collaterally assailed. *Windsor* v. *McVeigh*, 93 U. S. R. 282. In respect of this, it matters not whether the tribunal be one of technically superior or inferior jurisdiction. There are, however, some general formulae which have been generally adopted ever since the case of *Peacock* v. *Bell*, 1 Saund., 69. "The rule is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so."

"But when a superior court exercises a special statutory and extraordinary power, it stands upon the same ground and is governed by the same rules as courts of limited and inferior jurisdiction. The rule then is that nothing shall be intended to be within the jurisdiction but that which is expressly so alleged." *Haywood* v. *Collins*, 60 Ill., 333.

When, however, the circumstances which give jurisdiction to the inferior tribunal are once established or alleged on the record, when it is once authorized to proceed at all, then all its subsequent proceedings stand upon the same ground and are governed by the same rules as those of superior courts. Its subsequent proceedings, however wrong, however unauthorized, may render its judgments erroneous but cannot render them void. Accordingly, in *Young* v. *Lorain*, 11 Ill., 637, the court said:

"When the jurisdiction is thus established, and the court is *authorized to hear*, it follows, as a necessary consequence, that it is *authorized to adjudge*, and that judgment, being thus entered by authority of law, no matter how erroneous it may be, or even absurd, *though it be made in palpable violation of the law itself*, and manifestly against the evidence, is, nevertheless, binding upon all whom the law says shall be bound by it, that is, upon all parties and privies to it, until it is reversed in a regular proceeding for that purpose. *While it remains a judgment it can-*

not be inquired into nor its regularity questioned in any collateral proceeding. In another action the inquiry is not whether the court acted properly, but *had it a right to act at all?*"

In 1 Smith's Leading Cases, *817, it is said:

"The strictness with which the proceedings of inferior tribunals are scrutinized only applies to the question of jurisdiction, and when the existence of jurisdiction is proved or conceded, the maxim, *omnia rite acta*, applies to them as well as to courts of general jurisdiction."

When the *right to decide* is once established the *decision* may be erroneous, but a wrong decision cannot affect the *jurisdiction* of the tribunal. The right of the tribunal to decide, the right to proceed to judgment at all being established it is unimportant thereafter whether the jurisdiction of the court be general and superior, or special and inferior.

Voorhees v. *Bank of the United States* 10 Peters, 449.

Now recall for a moment, and before considering any qualification of this general rule, the well settled jurisdiction of the courts of the United States. They are of limited, it is true, but within those limitations, of general jurisdiction. They are given, by their organic law, "original cognizance, *concurrent with the courts of the several states*, of all suits of a civil nature at common law, or in equity when" the matter in dispute, exclusive of costs, exceeds five hundred dollars, and the controversy is between citizens of different states, or where a claim arises under the laws of the United States, and has been decided against in a state court. This general statement of the *limitations* upon their jurisdiction is accurate enough for the present purpose. *Act of Sept. 24, 1789*, ch. 20, § 11. *1 Stat. at Large*, 78. *Act of March 3, 1875*, § 1.

In *State of Pennsylvania* v. *The Wheeling, etc., Bridge Co.*, 13 H., 563, the court said:

"The rules of the high court of chancery of England have been adopted by the courts of the United States. And *there is no other limitation to the exercise of a chancery jurisdiction by*

these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States, and which has been decided against in a state court."

"In exercising this jurisdiction, the courts of the Union are not limited by the chancery system adopted by any state, and they exercise their functions in a state where no court of chancery has been established. The usages of the high court of chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government it has been observed."

In the case of *McCormick* v. *Sullivant*, 10 W., 199, in answer to the argument that the proceedings were void where the jurisdiction of the court in respect of the citizenship of the parties was not shown, the court say:

"The argument proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not on that account inferior courts in the technical sense of those words, whose judgments taken alone are to be disregarded. If the jurisdiction be not alleged in the proceedings their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities."

In *The United States* v. *Parrott et al.*, 1 McAll. (U. S. Cir. Ct., Cal.), 287, the court said:

"There is no doubt that the jurisdiction of the circuit courts of the United States is limited to certain persons and subjects, but within those limits it is the same in every state, and complete and full. * * * We cannot, therefore, consider the objection to the jurisdiction of this court as to the subject-matter available. In granting the relief prayed for, it has all the powers of the English chancery."

Whatever differences, then, may exist between superior and inferior tribunals, the proceedings and judgments of the federal courts are to be viewed as those of superior courts. They are not void if they do not show their jurisdiction, and their writs protect the officer executing them as those of superior courts do.

Recurring now to the general rule that where the court has once acquired jurisdiction of a cause it has a right to decide every question arising in it, let us consider whether the order now decided to have been wrong was *based upon a question which arose in the cause, and which it was necessary for the court to decide?* The court had jurisdiction to foreclose this mortgage. It had jurisdiction and power to subject this land to the payment of the mortgage debt, and for that purpose to order the land to be sold in *some* mode. It was its duty to order it sold in some mode. But in what mode should it order the sale to be made? Consider, for a moment, how that question then lay before the court.

On the one hand were the state statutes of redemption. They conferred upon the mortgagor the right to redeem from the sale under decree of foreclosure, and directed the master upon his sale to issue a certificate only.

On the other hand was the act of congress of 1828, which fixed for the courts of the United States in their final process the methods then in use in the several states. There were the emphatic decisions of this court that procedure and process prescribed by act of congress were beyond the reach of state legislation. *Wayman* v. *Southard*, 10 W., 49; *McCracken* v. *Hayward*, 2 H., 608. And there were *also* the decisions of this court that the proceedings in execution of a decree of foreclosure were of the nature of final process, and were analogous to an execution upon a judgment at law. Justice STORY had said in his Eq. Pleadings, § 408*a*: "Thus, for example, a decree of foreclosure and sale upon a bill brought by a mortgagee for a foreclosure and sale, (according to the practice in many states in America), is final, and *the sale is but in the nature of an execution;*" and in *Whiting* v. *Bank of the United States*, 13 Peters, 15, the supreme court of the United States said of such a decree: "Indeed, the ulterior proceedings are but a mode of executing the original decree like the award of an execution at law."

In addition to this, the supreme court of Illinois had passed upon the construction and legal effect of these very statutes. With the question directly before it, it had decided in *Williams* v. *Waldo*, 3 Scam., 264, that the statutes of redemption affected only remedy and regulated merely procedure, and matter of detail in the execution of the decree. It had said:

"The decree is the conclusion of the court upon the allegations of the bill and the proofs offered in support thereof. It ascertains the amount due to the complainant, and *subjects the property to be sold* for its payment. The rest is but detail, and not of the essence of the decree.

"To *direct* by a decree *that a sale* of mortgaged premises *shall be made in a particular way*, is but a *rule or direction of the court*, which the court itself can change."

And the court held that, that which was mere procedure while it lay in the discretion of the court, remained still procedure when regulated by legislative enactment. Then in *Bronson* v. *Kinzie*, 1 How. 311, the supreme court of the United States had confirmed this construction. It declared, it is true, that statutes acting only on remedies might affect so seriously the interests of a party as to amount, *by their degree of interference*, to a denial of a contract right, and in such case would come within the constitutional prohibition upon impairing contracts. That was the point decided in *Bronson* v. *Kinzie*, and such has been the carefully worded judgment of this court in similar cases down to that of *Edwards* v. *Kearzey*, at the last term. 96 U. S. R., 595. And afterwards in *Smith et al.* v. *Bryan*, in 1864, 34 Ill., 376, the supreme court of Illinois re-asserted the ruling in *Williams* v. *Waldo*, and declared that it was in harmony with *Bronson* v. *Kinzie*. "The point of difference is," it said, "that this court did not hold that the contract was impaired by a change of the remedy."

Thus the question lay before the circuit court in making this decree. It saw, moreover, the federal government continually exercising over real property in all the states a distinctively

federal law, altogether independent of the state governments. It saw acts of congress providing causes of alienation of land and modes and forms of devesting titles wholly unknown to state laws. It saw acts for the collection of direct federal taxes on land in disregard of the constitution of Illinois, which made a judgment of some court of record a condition of the sale of land for taxes. It saw the land of distillers sold under judgments or decrees, but heard nothing of the application of statutes of redemption. It saw the bankrupt law, under an adjudication of bankruptcy, devest the land titles of the bankrupt and sell the land for the payment of his creditors, but saw nothing of state rights of redemption. * Under the judgment of the district court the bankrupt law authorized the absolute sale, for whatever price it would bring, of mortgaged land, freed from the lien of the mortgage and devesting absolutely and finally the estate of the mortgagee. *Ray* v. *Norseworthy*, 23 Wall., 128. No such proceeding was known or would be permitted to the state law. All this was by federal law, and it seemed to accord but a slender sanctity to the *exclusive* domain of the state law over the titles to land and the modes and conditions of its transfer. It might, indeed, be said to all this, that it was done under powers fully delegated to the federal government; but on the other hand it would be said that the power to enforce the process of its courts, as the acts of congress should provide, was equally delegated.

Thus upon all these considerations the question remained to be decided: In what mode should it order the sale to be made? Can it be said this question did not arise in the cause? Can it be said the court was not compelled to decide it? In *some* mode it must order the sale to be made. Must it not inquire by what law the rights of parties were to be governed, and what that law required of the court? And if the decisions of the supreme court of the United States, and of the supreme court of Illinois, which declared that this matter of the mode of sale was matter of process, were to go for anything; if the act of congress of

* Barron v. Mackay
1 Biss. 247

1828 which fixed for that court the process then in use was to go for anything; if the reiterated declarations of this court that the procedure and process of the federal courts were above the effect of state legislation were to go for anything, there seemed but one decision to be made. Accordingly for 37 years the court decided as it did in the case at bar.

Now, if this question thus presented was one which the court had no right to decide, so that an incorrect judgment would in this case be void, it is because, by reason of some qualification of the general rule above stated, this question was excluded from it. What qualification is there of the rule?

We meet with a class of cases in which the judgments of tribunals of every sort are held void, although the court has once acquired jurisdiction of a cause and the right to hear and determine it. Instances of this sort are called to mind in the cases of *Ex parte Lange*, 18 Wall. 176, and *Windsor v. McVeigh*, 3 Otto, 282. In the latter case this court said:

"The doctrine invoked by counsel that where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as 'civil or criminal,' or to particular modes of administering relief, such as legal or equitable, or to transactions of a special character, such as arise on navigable waters or relate to the testamentary disposition of estates, or to the use of particular process in the enforcement of their judgments. *Norton v. Meador*, Circuit Court of California. Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court can-

not order in the case a specific performance of contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases."

So also in *Ex parte Lange*, *supra.*, this court said:

"It is no answer to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would be simply void. Why void? Because he had no power to render such a judgment. So if a court of general jurisdiction should, on an indictment for libel, render a judgment of death or confiscation of property, it would for the same reason be void. Or if, on an indictment for treason, the court should render a judgment of attaint whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the state, it would be void as to the attainder, because in excess of the authority of the court and forbidden by the constitution."

It may be readily seen that all such cases conform to well settled principles of law, which remove them entirely from analogy to the question at bar.

The rule that when a court has once acquired jurisdiction in a cause no subsequent proceeding or judgment can be void, is subject to this qualification, that it must be a proceeding or judgment which is *within the general powers* of the court. It may be otherwise as to judgments not within its *general powers*. For example, it is not within the *general powers* of a court of chancery to order that a mortgage debt be paid within one hundred days or that the defendant be put to death. The court of chancery has no power to put a man to death *at all*. But it is within its general powers to order mortgaged lands *to be sold* to

satisfy the mortgage. So far does the rule hold good, that a judgment *within the general powers* of a superior court is valid, notwithstanding the *legislature has prohibited their exercise in the particular instance*. Two antithetical cases sufficiently illustrate this principle for the purpose of this argument:

The case of *The Marshalsea*, 10 Coke, 68, 76, settled the doctrine that a criminal information in the court of common pleas, or a common recovery or a writ of right in the king's bench would be void as between the parties to the cause, and could not even be pleaded a justification for acts done under them by the officers of the court.

On the other hand, in *Prigg* v. *Adams*, 2 Salkeld, 674, it was held that a judgment in the common pleas, on a cause of action originating in Bristol for five shillings, was valid although an act of parliament creating a court in that city, with exclusive jurisdiction in all cases under forty shillings, had provided that if suit were brought in the courts of Westminster for a cause of action of a less amount, originating in Bristol, and judgment were given for the plaintiff, the judgment should be void.

To the same effect, it is said in the case of *The Marshalsea*, 76 *b*, that if the court of *common pleas* holds plea in an appeal of *death* and the defendant is attainted it is *coram non judice*. But if the same court, in a plea of *debt* awards a *capias* against a duke, which by the law doth not lie against him, and that appear in the writ itself, although the *writ be against law*, yet, as the court has jurisdiction of the cause, the sheriff arresting by force of the writ is excused. So, also, if the court of common pleas hold plea in debt without original it is not void, *for they are judges of those pleas*, and it cannot be said the proceeding is *coram non judice*.

So in the case of *Isabel, Countess of Rutland*, 6 Coke, 52*b*, it was declared that although a countess could not by law be arrested for debt or trespass, yet, if a *capias ad satisfaciendum* be awarded by the common pleas against a countess, it is not

void but it must be executed, and the officer would be protected by it.

Now, do not all the instances cited illustrate and agree with this? "If the action be upon a money demand, the court has no power to pass judgment of imprisonment in the penitentiary upon the defendant." Certainly it has not. It is not within the general powers of the court of common pleas to enter the criminal judgments of the court of king's bench. "If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract." Certainly not. The peculiar remedies and decrees of a court of chancery are not within the general powers of the court of king's bench. "If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will." Certainly. The probate of a will is not within the general pow-powers of the court of common pleas. "If a justice of the peace, having properly before him a party charged with a misdemeanor, should render judgment that he be hung it would be void." Certainly. It is not within the general powers of a justice of the peace to order any one to be hung *at all*. So it is not within the general powers even of a court of general jurisdiction to order a capital penalty or confiscation of property on an information for libel. Nor is it within the general powers of any court in this country, upon an indictment for treason, to render judgment of attainder of blood. Courts organized under the constitution of this country have nothing to do with attainder, any more than a justice of the peace with a capital penalty, or the court of common pleas with the remedies and decrees of a court of chancery, or with the criminal judgments of the king's bench.

Instances of this kind, it is said, show that the general doctrine is subject to many qualifications. Is it presuming too much to say that it is subject but to the *one*,—that the judgment

in question must be within the general powers of the tribunal entering it?

Now, recurring to the case at bar, it was within the general powers of the court below to decree foreclosure of this mortgage. It was within its general powers to order the land *sold* by the master, and to order *some* method in which the sale should be made. Was it not within its general power to determine whether, under all the law governing the court, the mortgagor was entitled to a right of redemption or the mortagee to an absolute sale by the master, and to order the mode of sale conformable to its decision of that question?

The argument that is raised for the limitation of the court's power I understand to be this: A series of adjudged cases from that of the *United States* v. *Crosby*, 7 Cr. 115, to that of *Brine* v. *The Hartford Fire Ins. Co.*, 96 U. S. R. 627, have affirmed the proposition "that the title and disposition of real property is exclusively subject to the laws of" the state in which it is situated, and that to that law "must we look for the rules which govern its descent, alienation and transfer, and for the effect and construction of its conveyances." And the reason which underlies this reiterated doctrine is given in *United States* v. *Fox*, 94 U. S. R. 320. There it is said:

> "The power of the state in this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the federal government. The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority."

Upon this ground, that the states have not delegated to the federal government the power to deal with real property in any other way than that provided by the local statute, it is contended that congress had no such power with which it could clothe its courts. Accordingly it is claimed that this constitutes a

limitation upon the general powers of the federal courts, and that a proceeding or judgment concerning the title to or alienation of realty and opposed to the local law is void in the federal court as being outside of its general powers, though it might be otherwise in the courts of the state which are created by a sovereignty having a wider power.

It is the misfortune of this chain of argument that it devours itself. It involves an illogical application of the principle and rule invoked and of the cases in which they are announced.

Whenever a general personal or property right exists under the laws of any state, it may be enforced in any federal court within the state having jurisdiction of the parties. *Railway Co. v. Whitton*, 13 Wall., 286. If a new right in lands or other property be at any time created by the law of any state, the federal courts sitting in that state will take cognizance of it and enforce it. The right may be one created and governed altogether by the *lex loci*, but the federal courts in enforcing the rights of the parties are empowered to administer the law by which those rights are created and governed. Upon the subject of the titles and modes of disposition of real property the courts of the United States are entrusted with the administration of the state law. And they do this, not merely by the force of such a limited sovereignty as is suggested, but by the force of the sovereignty which creates the federal government. Just as, by virtue of powers conferred by the states, the federal government can create courts to sit in the respective states and administer the federal laws over certain rights and subjects of judicial cognizance, so by virtue of the same powers the federal government can empower its courts to administer the state law over certain other rights and obligations. The states, in reserving the titles and disposition of land to be governed by their own law did not reserve the exclusive cognizance of those subjects to their own courts, but conferred jurisdiction to enforce and administer those rights upon the courts of the United

States also. Now, under this dual system the state and federal courts, although of different sovereignties, are not to be viewed in the same light as courts created by England and France respectively. France cannot create a court to sit in England and confer upon it powers to administer *any* law there. But the federal courts have jurisdiction sitting in Illinois to administer there the acts of congress or the common law and statutes of the state according as one or the other furnishes the rule of judgment in the particular case. Whether executing the laws of the states or the acts of congress, the courts of the United States proceed equally under authority derived from the states. According to settled principles the ultimate source of all federal authority is the states conferring p wer through the constitution. The only difference between the cases of a federal court deciding upon federal law, as upon the revenue, for example, and of the same court deciding upon titles to land, or the legal effect of a conveyance is, that in the one case the court takes the law, which it administers, directly from the state, and in the other, mediately from the state, and through the intermediary of the federal government.

Now, in order to adminster the law of the state, must the court not know judicially what it is? And if it must *know* judicially, may it not inquire judicially what it is? And is not its judicial inquiry made upon the like foundation as to jurisdiction with that of any superior court inquiring as to the law it is to administer? In *Green* v. *Neal's Lessee*, 6 P., 297, this court said:

"In a great majority of the causes brought before the federal tribunals they are called to enforce the laws of the state." "The inquiry is, what is the settled law of the state at the time the decision is made. This constitutes the rule of property within the state by which the rights of litigant parties must be determined."

A federal court, therefore, sitting in a state and administering its laws, has the same *general powers* as the courts of the

state, if it have jurisdiction of the parties. If a new right in real property, whether a right of dower or homestead or redemption be conferred by law, a federal court, having jurisdiction of the parties, may enforce it. And the right, when conferred, stands in all courts upon the same level so far as jurisdiction is concerned with all other rights given by law. A judicial error of judgment or misdirection by the federal court concerning this right cannot differ in nature from a similar error by the state court, nor from one relating to any other legal right.

With this the decisions of this court agree. In *Ex parte McNeil*, 13 Wall., 243, the court said:

"A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. *This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations as if it had been brought in the proper state tribunal of the same locality.* In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maritime jurisdiction."

There is no escape from the conclusion that the judicial acts of the federal court in the case at bar must be conceded a legal obligation and effect equal at least to that which would belong to them if they had been passed in the courts of the state.

If such a limitation as is suggested can be held to hedge the jurisdiction and bound the general powers of the courts of the United States, the logical consequence is inevitable that the so-called courts of the United States have no judicial power whatever, and nothing worthy to be called jurisdiction over any

subject matter in the cognizance of which the local state law must furnish the rule of decision. This must be true of every question affecting land. Take an estate of dower for example. Its extent, and its modes and conditions of alienation are continually changed and modified by statutes, and this local law continually furnishes most perplexing questions to the state courts. That rule, upon any subject of this character, must be assumed to be correct which is settled by the supreme court of the state. In such case, upon the hypothesis, the federal court, charged with the duty of enforcing the rights of parties, proceeds with jurisdiction if it construes the state law correctly; but if its judgment ultimately proves to contravene the statute of dower, that judgment will *thereupon* turn out to have been without jurisdiction. In other words, it has jurisdiction in all matters governed by state law to decide right, but every erroneous judgment is in some mysterious way outside the jurisdiction and void. In such case every judgment is void, and may be attacked collaterally unless it can stand the test of a writ of error. There is no judicial function in this; and as there is no common law of the Union, no common law except within the framework of the state, the judicial power of the courts of the United States is altogether vaporized and lost. So complete a *reductio ad absurdum* as this sufficiently shows the fallacy upon which the hypothesis is founded.

Nor is this all. The incorrectness of the conclusions advanced is shown by the adjudged cases in an instance of undoubted limitation upon the jurisdiction of the federal courts. They are limited in respect of the citizenship of the parties between whom they have the jurisdiction to adjudge. This limitation is organic and created by the constitution. Jurisdiction other than as affirmatively permitted is a reserved power not delegated to the federal government for its courts. It is settled that a judgment upon a record which does not show the requisite conditions of citizenship will be reversed for error. But it is

equally well settled that if a record show the requisite citizenship of parties, and even *if it be silent* altogether on that subject, the judgment cannot be attacked collaterally by proof that the parties were actually citizens of the same state. Even in such a case the judgment on such a record is not void but is valid until reversed in a direct proceeding.

McCormick v. *Sullivant*, 10 Wh., 199; 1 Smith's Lead. Cas., *824.

The reservation of power by the states over titles, and the modes of disposition of realty do not so affect the jurisdiction of a federal court as to differ it from that of a state court in enforcing such rights and methods as the state laws create and provide. The decrees and judicial orders in this case and the proceedings upon them, have, therefore, all the legal force and obligation they would have had if they had been passed in the state courts. Had they been passed there it is not doubtful that they would have been accounted erroneous merely, at the worst, and valid until reversed; and but for the ruling in the *Brine* case they surely would have been held, as they have been heretofore held, valid and conclusive altogether. The supreme court of Illinois has held of this statute that it does not enter into the essence of the decree, but governs mere detail of its execution. Mistake in the modes of remedy does not render a judgment void for want of power to render it.

Williams v. *Waldo*, 3 Scam. 268.
Smith v. *Bryan*, 34 Ill.
Davis v. *Conn. Mut. Life Ins. Co.*, 84 Ills. 408.
Farrell v. *Parlier*, 50 Ill. 274.
Rhinehart v. *Stevenson*, 23 Ill., 524.
Young v. *Lorain*, supra. p. 7.
Feaster v. *Fleming*, 56 Ill. 459.
Buckmaster v. *Carlin*, 3 Scam. 106.

Notwithstanding the statutes of redemption, the power to decree strict foreclosures exists, and may in certain cases be ex-

ercised by the courts of this state. *Johnson* v *Donnell*, 15 Ill. 97. Would it be considered for a moment that such a decree wrongly made was void for want of jurisdiction to make it? In cases like the present the court has jurisdiction to order a sale in *some* method, of the property. If the court errs in its judgment concerning the method required by the law governing the court, its decree may be reversed on appeal or by bill of review brought within the time allowed by the statute providing the limitations on those remedies. When that time for vacating or reversing the decree has expired, the decree being entered with full jurisdiction is not subject to be attacked collaterally as being a nullity.

So in the case of a sale of an infant's land, which neither a court of law nor of equity has any inherent, original jurisdiction to direct, but which it must in every case show legislative authority for, *Lead. Cas. Eq.* vol. 2, Pt. 2, 1504; *Tyler on Inf. and Cov.* 296, §193, it has been often held by the supreme court of Illinois, that when the court has once acquired jurisdiction, once gained the right to proceed and order a sale *at all*, no subsequent error of judgment or irregularity in the proceedings can have any "*relation to the jurisdiction of the court*" in the premises. "Advantage could only be taken of it in a direct "proceeding to reverse the decree on account of error interven-"ing." *Spring* v. *Kane, et. al.*, 10 Ch. Leg. News, 368; *Young* v. *Lorain*, 11 Ill. 624.

We have now to meet another form in which this objection is presented. It is said that this decree, the sale made under it and the deed of the master made on that sale will constitute a conveyance equivalent to those passed upon in certain reported cases in this court; and will be like them ineffectual because not in conformity with the state law.

It may be observed that all these cases of ineffectual conveyances cited, excepting one, were cases of conveyance by private individuals. In one of these cases the law of Massachu-

setts made a seal a condition of the validity of the deed, and a deed was made without seal. In another a deed was executed without the witnesses which the law made essential to its validity. In another, in order that a devise of land might be valid, the law required the will to be probated in the county where the land lay, and it had been probated only in another state. In the case of *Watts* v. *Waddell*, 6 P., 389, a court of equity sitting in Kentucky attempted by mere force of its decree and the deed of its commissioner to convey land in Ohio. The deed of the commissioner, of course, had no force of its own and no effect unless by operation of law through the force of the decree. Now, nothing is better settled than that conveyances by a court, having force only by operation of law, have force only within the territorial limits of the sovereignty creating the court. Such conveyances of land beyond those limits are not within the general powers of any court. Their force is spent at the frontier. A conveyance of land in England by a court of France having only the force of the law of France is a nullity in England. The law of France is not in force in England. For that reason the Kentucky decree and deed were held nullities in Ohio, and it was held that no statute of Ohio existed to help them out. But such a decree and deed of Illinois land by a federal court sitting in Illinois is not a nullity in itself in the absence of some affirmative statute of Illinois to give it life. There is this difference between the decree in this case and that in *Watts* v. *Waddell*. The latter was a nullity in Ohio unless some local statute affirmatively gave it force. This is valid and operative in Illinois unless some local statute affirmatively makes it a nullity. In itself and alone it is good and conclusive. Does it go for nothing in this attempted transfer of title that the whole judicial function and jurisdiction of a superior court of original jurisdiction is involved as an element? This brings us to consider the last point in this argument, the difference between technically judicial sales and those that are of other character.

The sale when made was made in *obedience to the decree* of the court in a cause where it had jurisdiction to make a sale of the land to enforce a lien. It was reported by the master and *was confirmed by the court* by a decretal order, which was entered of record, and by which, also, the *master was ordered by the court to make the deed* in question. The deed was made, therefore, in obedience to the decree of the court. In such a case the sale is the judicial act of the court. The court is the *vendor*. The sale is a judicial sale.

It is otherwise with sales on execution by the sheriff or a marshal, when they are not required by law to be nor are in fact *confirmed by order of the court*. Such a sale differs entirely from the other in its legal quality.

A common law judgment contains no direction of the court nor any authority within itself to the sheriff or any other officer to sell any land of the judgment debtor. The authority to sell such land under execution is given *by statute and the writ* to the sheriff or marshal. He looks to the statute for his power; and he is a ministerial officer executing a statutory power. Of course he must conform to the statute. He must pursue his power. It is not the sale of the court. It is not reported to nor confirmed by the court. The sale when made is the sheriff's sale. He is the vendor under his power, and his sale has no judicial quality whatever.

But when an execution sale is required by law to be confirmed by the court, and it is so confirmed by its judicial order, and validity is thereby given to it, such a sale is held to acquire a judicial quality, and becomes, like judicial decrees, conclusive between the parties, and is not subject to be attacked collaterally, and can be avoided only by some direct proceeding for that purpose.

Accordingly in *Griffith* v. *Bogert*, 18, H. 158, land in Missouri, had been sold under execution in a case where the sale was required by law to be reported to and confirmed by the

court. The validity of the sale was attacked collaterally when the deed was offered in evidence, and it was alleged to have been irregular, but it *had been confirmed by the court*. In that case Mr. Justice GRIER said:

"The writ authorized the sheriff to sell; a sale was made in pursuance thereof by the sheriff, and a deed executed to the purchaser, which was afterwards acknowledged in open court according to law. At this time, all parties interested could and would have been heard to allege any irregularity in the proceedings that would justify the court in setting it aside. The objections to this sale do not reach the power of the court, or the authority of the sheriff to sell. The issuing of an execution on a judgment before the stay of execution has elapsed or after a year and a day without reviving the judgment, the want of proper advertisements by the sheriff, and other like irregularities, may be sufficient ground for setting aside the execution or sale on motion of a party to the suit, or any one interested in the proceedings; but when the objections are waived by them *and the judicial sale, founded on these proceedings, is confirmed by the court, it would be injurious to the peace of the community and the security of titles to permit such objections to the title to be heard in a collateral action.*"

A foreclosure suit in equity is a proceeding substantially *in rem*. The court is dealing with specific parcels of land. *It derives its power to make a sale of the land, not from any statute, but from what is inherent in its constitution as a court of equity of general jurisdiction.* The master, in making sale, looks to no statute for his power, but to the decree or order of the court. The sale, when made, is not his sale, but is the sale of the court. It is of no force or value as a sale, until it is reported by him and *confirmed by the court*. When it is thus confirmed and the deed is made by order of the court, it is the sale of the court—a judicial sale—and has for its *foundation the entire jurisdiction of the court*. The sale and deed are not the acts of a ministerial officer, executing a statutory power. They are the judicial acts of the court. They are made by authority of its decree. They may be erroneous, but they cannot be void if the court had jurisdiction in the premises to decree a sale to be made at all. *Bozza* v. *Rowe*, 30 Ill., 198; Rorer on Judicial Sales, §§ 1, 5, 13, 19, 24, 28, 29, 31, 32.

The decree, the sale, its confirmation, and the deed were alike judicial acts of a court of competent jurisdiction. *Rorer on Judicial Sales*, §§ 24, 25, 26. They have all the stability, and afford all the security to purchasers relying on their judicial character that other judicial acts do. They are not void, therefore, though they may be erroneous. They are not subject to be attacked collaterally; and, *as judicial acts*, they are conclusive upon all parties until vacated in some direct proceeding had for that purpose.* This element of security is given by the law to this mode of conveyance from considerations of public safety; and we cannot believe that it was ever intended to place such judicial proceedings upon the same level with the acts of private agents under common warrants of attorney.

EDWARD S. ISHAM,

Of Counsel for Nathan Powell.

* Fisher v Bassett 9 Leigh 119
Evans v Percifull et al 5 Ark 424

No. 288.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1877.

IN CHANCERY.

EMERSON G. ORVIS, *Appellant.*

vs.

NATHAN POWELL, ET AL., *Appellees.*

Appeal from U. S. Circuit Court, Northern District of Illinois.

BRIEF

BY

JULIUS ROSENTHAL AND A. M. PENCE,

ON BEHALF OF ELIAS GREENEBAUM, GERHARD FOREMAN, INTERNATIONAL BANK, FRANCIS A. HOFFMAN, JULIUS ROSENTHAL, JOSEPH TABOR, LEVI ABT, JOHN BRENNOCK AND PATRICK BRENNOCK,

Appellees.

CHICAGO:

LEACH, BARNARD & CO., LEGAL PRINTERS, 194 RANDOLPH STREET.

1878.

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Brief by Julius Rosenthal and A. M. Pence,

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Appellees.

MAY IT PLEASE THE COURT:

Complainant, Powell, filed his bill to foreclose a mortgage, about which there is no dispute. The amount found due is admitted; and the chief question arising upon the errors, to be assigned, as we suppose, will be as to whether the court has ordered the premises sold in the inverse order of alienation by the mortgagor.

The premises consist of Blocks 13, 14, 15, 16, 17, and 18, in Packer's Subdivision, &c.

The abstract of title introduced in evidence by agreement, shows the following order of alienation by the mort-

gagor after the execution and record of mortgage foreclosed in this cause.

1st. N. 201 feet Block 16, Walker to Flanagan; warranty deed, dated February 27, 1874, filed for record April 15, 1874, subject to a trust deed by Kinney to Rogers, described under No. 4 following. (See Record, pp. 95, 96.)

2d. S. 100 feet Block 16, Henry H. Walker to Orvis, (the appellant); warranty deed, dated February 26, 1874, filed for record April 9, 1874. (Record, p. 95.)

3d. Block 14, S. J. Walker to Ricker; warranty deed, dated February 25, 1873, filed for record April 5, 1873. (Record, p. 95.)

4th. Block 16, S. J. Walker to Kinney; warranty deed, dated November 25, 1872, filed for record December 2, 1872. (Record, p. 95.)

Kinney, the grantee, at same time, executed and delivered his note for $12,000 to S. J. Walker, due three years after date, for purchase money, and to secure same, executed his trust deed to Rogers, of same date as deed by Walker to Kinney upon same premises. The trust deed was not recorded until October 23, 1873, (Record, p. 96); but Kinney still held the title at the time of its record, and up to March 6, 1874, at which latter date he conveyed his equity of redemption of same block back to H. H. Walker by quit-claim deed, which was recorded March 16, 1874.

After this conveyance back to Walker, he conveyed to Flanigan and Orvis separate portions of same block, at the dates described in Nos. 1 and 2, above.

The $12,000 note, secured by said trust deed, Kinney to Rogers, was sold to Greenebaum & Foreman, and is still held by them. (Record, p. 70.)

The S. 100 feet, now held by Orvis, was afterwards released from that trust deed.

5th. Blocks 13 and 18, S. J. Walker conveyed to Coolbaugh and Powers by warranty deed, dated July 1, 1872, and filed for record December 7, 1872. (Record, p. 97.) Several other blocks were conveyed to Coolbaugh and Powers at same time, but were afterwards re-conveyed.

6th. Block 15, S. J. Walker to Patrick Brennock; warranty deed, dated March 18, 1872, filed for record October 10, 1872.

7th. Block 17, S. J. Walker to Ralston; warranty deed, dated October 2, 1871, filed for record September 4, 1872.

H. H. Walker and S. J. Walker are treated as identical, as the title was held indifferently, sometimes by one, and sometimes by the other. (Record, p. 70); but Samuel J. Walker was the managing man. The decree ordered the property sold in the order above stated, which is the exact order of the dates of record of the various instruments of conveyance.

We admit the law to be that a court of equity, when a proper case is made, will order premises sold in the inverse order of alienation, upon a bill to foreclose a mortgage.

2 Jones on Mortgages, §§ 1620, 1621.
Iglehart v. *Crane*, 42 Ill., 261.
Lock v. *Fulford*, 52 Ill., 166.

But it requires a cross bill filed for that purpose by one defendant against all the others interested.

Appellant Orvis did file a cross bill against Coolbaugh, Powers, and Louisa M. Tillinghast, but not against the other defendants, nor was Mrs. Tillinghast ever brought into court (Rec. pp. 51, 52). She was ruled to answer March 18, 1875, but she had never been a party to the record by any pleading until the cross bills of Orvis and Ricker mentioned her as defendant, and not being in court before, she could not be ruled to answer without subpœna and service,

or appearance. Mrs. Tillinghast was the purchaser of S. ½ of block 18, which, appellant claims should have been sold before the portion owned by appellant, and yet she was not before the court.

No further attention was given by appellant to bring Mrs. Tillinghast before the court, and no attempt to default her was made; and in its decree the court says nothing about the cross bill being taken as confessed as to her (Rec. p. 86), and further on the court dismisses the cross bill for want of equity. The cross bill on its face shows no case whatever against Mrs. Tillinghast. And the court, upon its own motion, properly dismissed such pretended cross bill for want of equity.

Appellant Orvis did not except to the Master's report.

Appellant did not join the other defendants who own the remainder of the premises with him, in his appeal, nor does he show any excuse for not doing so.

Defendant Ricker excepted to the Master's report, but he has not appealed.

The decree of the court and the order of sale is in strict accordance with rule of the inverse order of alienation.

I.

THE NON-JOINDER IN THIS APPEAL OF WILLIAM FLANIGAN, SHERMAN A. RICKER AND THE OTHER DEFENDANTS, NO CAUSE BEING SHOWN THEREFOR, AND THERE BEING NO SUMMONS TO THE OTHER DEFENDANTS, AND SEVERANCE IS A FATAL OBJECTION TO THE JURISDICTION OF THIS COURT, AND WE ASK, PRELIMINARY TO THE DISCUSSION OF THE MERITS, TO HAVE THE APPEAL DISMISSED.

Owings v. *Kincannon*, 7 Pet., 399.
Williams v. *Bank*, 11 Wheat., 414.
Masterson v. *Herndon*, 10 Wall., 416.
Simpson v. *Greeley*, 20 Wall., 152.

All the defendents are directly interested in the result of this appeal, and hence it cannot be determined without having them present before this court. If the order of sale were changed under the decree of this Court, Mrs. Tillinghast and the other defendants might lose their property. Hence their direct interest. Appellant does not bring Mrs. Tillinghast here and give her an opportunity to litigate the question with him. This court cannot adjudicate upon this case piecemeal, and must dismiss the appeal. (See brief of J. P. Wilson, filed herein).

II.

WHERE AFFIRMATIVE RELIEF IS REQUIRED BY ONE DEFENDANT AGAINST ANOTHER, THEN THERE MUST BE A CROSS BILL FILED BY SUCH DEFENDANT AGAINST THE PLAINTIFF AND ALL THE OTHER DEFENDANTS INTERESTED IN THE DETERMINATION OF THE QUESTION TO BE RAISED, SO THAT THE QUESTION MAY BE FULLY LITIGATED BEFORE THE COURT.

Story, Eq. Pl. § 392.
Iglehart v. *Crane*, 42 Ill., 271.

The interest of appellant, who was a defendant, was antagonistic to the interest of some of the other defendants, as the appeal shows, for the complaint of appellant is not against the complainant below, but against his co-defendants. He says the court should have first sold the property of Mrs. Tillinghast, but he gives her no opportunity to litigate that question with him by filing a cross bill against her and bringing her into court. His pretended cross bill names her as a defendant, but she has never been brought into this suit by service of subpœna or entry of appearance.

Such a question could only be litigated between the de-

fendants upon a cross bill, as was directly held in *Iglehart* v. *Crane*, and as must be evident, without authority for the proposition.

And this pretended cross bill of appellant has no merits, and states no case upon its face.

By reference to Rec., pp. 51, 52, the Court will see the nature of the pretended cross-bill of Orvis. Aside from the want of proper parties, it does not contain a single statement which, if admitted, would give a right to any relief against Mrs. Tillinghast.

It simply alleges that D. W. Tillinghast, before his death, bought these premises of Walker — took possession, put buildings on same, and then died. That after his death, Mrs. Tillinghast took possession, (as heir we suppose,) and then purchased the same premises of Coolbaugh and Powers — which contract does not appear of record — and he simply asks that Coolbaugh and Powers make a deed to Mrs. Tillinghast, and states that if such deed were made, it would be after the date of the deed to Orvis; which is most certainly true. There is no pretense in his cross-bill, that Coolbaugh and Powers were not the rightful owners of that block, as the abstract of title, put in evidence by stipulation of Orvis' solicitor, shows they were; nor does it pretend that Coolbaugh and Powers did not receive and record their deed before Orvis received and recorded his. And the abstract of title again shows that such was the exact fact.

It is evident, therefore, that the cross-bill contained no equity against Mrs. Tillinghast upon its face, even had she been brought into court; and hence, that the court properly dismissed it for want of equity. (See Rec., p. 88.)

III.

APPELLANT DID NOT EXCEPT TO THE REPORT OF THE MASTER.

And without an effort to have the error, if any, corrected by the court below, this Court will not look into it.

Brockett v. *Brockett*, 3 How 691

83 Equity Rule.

Harding & Hamby

The foregoing points have been more f
the brief of Mr. John P. Wilson, counsel
plainant, Powell; and we do not deem it necessary to add anything further as to these questions.

Upon the merits of the case, we desire to add the following point:

IV.

APPELLANT WILL ASSIGN FOR ERROR THAT THE SOUTH HALF OF BLOCK 18 SHOULD BE SOLD PRIOR TO THE SALE OF THE SOUTH 100 FEET OF BLOCK 16.

Block 18, with other blocks, were sold and conveyed to Coolbaugh and Powers on July 1, 1872, by deed, which was filed for record on Dec. 7, 1872. (Rec. p. 97.)

The south 100 feet of Block 16 was sold and conveyed to appellant, Orvis, by deed dated February 26, 1874, which was filed for record April 9, 1874. (Rec., p. 95.)

As between those two instruments, the deed to Coolbaugh and Powers is prior to the deed to Orvis; and if things are actually as they seem, then in the inverse order of alienation the property of Orvis should be first sold.

1st. Are there are any facts, which modify this seeming condition of things?

Samuel J. Walker is a character in the city of Chicago,

fendants upon a cross bill, as was directly held in *Iglehart v. Crane*, and as must be evident, without authority for the proposition.

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83 Equity Rule.

Harding v Handy 11 Wheat - 126

The foregoing points have been more fully discussed in the brief of Mr. John P. Wilson, counsel for original complainant, Powell; and we do not deem it necessary to add anything further as to these questions.

Upon the merits of the case, we desire to add the following point:

IV.

APPELLANT WILL ASSIGN FOR ERROR THAT THE SOUTH HALF OF BLOCK 18 SHOULD BE SOLD PRIOR TO THE SALE OF THE SOUTH 100 FEET OF BLOCK 16.

Block 18, with other blocks, were sold and conveyed to Coolbaugh and Powers on July 1, 1872, by deed, which was filed for record on Dec. 7, 1872. (Rec. p. 97.)

The south 100 feet of Block 16 was sold and conveyed to appellant, Orvis, by deed dated February 26, 1874, which was filed for record April 9, 1874. (Rec., p. 95.)

As between those two instruments, the deed to Coolbaugh and Powers is prior to the deed to Orvis; and if things are actually as they seem, then in the inverse order of alienation the property of Orvis should be first sold.

1st. Are there are any facts, which modify this seeming condition of things?

Samuel J. Walker is a character in the city of Chicago,

a real estate speculator, whose transactions heretofore amounted, not only to millions, but tens of millions; and if he once possessed a tract of land, he continued to trade with it, and convey it, and agree to convey the same, long after he had parted with the title thereto, provided he could find a party who would trust his word, without examination of title.

So he traded with the South half of Block 18, long after he had sold and conveyed same to Coolbaugh and Powers. He sold the same to D. W. Tillinghast, who, relying upon his word as to the title, went into possession of same, " and proceeded in good faith to erect buildings, and other " improvements thereon, for the purpose of killing and " packing cattle, hogs, &c., and in good faith carried on " said improvements to completion, at an expenditure of a " large sum of money, to wit, the sum of $8,000, or " $9,000."

This is the language of the contract, dated September 3, 1874, introduced by Ricker in evidence (Rec., p. 81), and consented to by Orvis (Rec., p. 54).

The same instrument recites, also, that the original contract between D. W. Tillinghast and S. J. Walker was entered into on February 9, 1874, and after he had gone into possession, and had expended this large sum of money, he died the latter part of April, 1874. (See testimony of Boone, Rec., p. 80).

That original contract was never signed, but Tillinghast took possession thereunder, and had completed the building before his death.

After the death of Tillinghast, and after the expenditure of this large sum of money, and after the discovery of not only the incumbrance in question—the Powell mortgage—but also of a trust deed to Bacon Wheeler, dated October 1, 1870, for $7,500 (Rec., p. 97); and after the discovery that S. J. Walker did not have the title to the same, and in

order to protect herself as much as possible, Mrs. Tillinghast, the widow, prevailed upon Coolbaugh and Powers, to agree to convey the said block to her, upon the same terms, substantially. And thereupon, they made a new contract with her, in their own names, whereby they ratified the terms as far as possible, which had been made by Walker, but provided that the benefit should accrue to them, and the purchase money be paid to them, if any, after satisfaction of the liens thereon. No evidence anywhere that they recognized any interest in Walker to said land.

That contract is written by an unskillful hand, but the spirit of it can be ascertained by reading it. Walker, upon finding it impossible to reap the benefit to himself, readily consented to the new arrangement. Before referring to the language of the new contract, we wish to refer to the fact, that the title to this block had been conveyed by Walker to Coolbaugh and Powers, on July 1, 1872, by warranty deed, recorded December 7, 1872 (Rec., pp. 60, 97). And this was an absolute sale, without any instrument of defeasance, or any agreement that it should be held simply as security. Mr. S. J. Walker himself testifies: "I did make a sale of this property at one time "to Coolbaugh and Powers, and afterwards canceled the "sale, or agreed to take it back, and let them hold the title "for the money advanced by them, if any money was due "them."

Q. "At the present time, is there anything due Mr. "Coolbaugh for which he should hold that security?

A. "Yes, sir."

And then he states that the indebtedness due to Coolbaugh is more than sufficient to absorb the whole block, after satisfaction of other liens thereon, (Rec., pp. 65, 66).

It need only be stated, that title to real estate cannot be divested by verbal agreements. The title stands of record in Coolbaugh and Powers, by an absolute deed, which

Walker admits was originally an absolute conveyance to Coolbaugh and Powers. The estate has not been vested in Walker by any method known to the law. Nor can an absolute deed be converted into a mortgage, by a verbal agreement to that effect. Estates cannot be so talked away.

Mr. Orvis, the appellant here, filed a cross-bill in which he admits the conveyance of the South half of Block 18, to have been made to Coolbaugh and Powers, as above shown, but goes on to claim, that Coolbaugh and Powers agreed, in writing, to convey the same to Mrs. Tillinghast; and if such conveyance were made, it would be the last alienation in order, (See Rec., pp. 52, 53). But if it be admitted that this Block 18 could not be *first* sold, while standing in Coolbaugh and Powers—if the inverse order were observed—how then can it be claimed, that the moment after Coolbaugh and Powers should convey the same, it could be *first* subjected to sale?

The inverse order of alienation has reference to alienation by the common owner of the whole tract, and not the subsequent alienation by a grantee of that common source. What protection would it be to a grantee, who took the first deed, if, after deeds were made of the remainder of the tract, he could not sell his block, without rendering it *first* subject to sale under the original mortgage. No person would buy of him. The rights of the parties are fixed by the date, or order of alienation by the common owner, and not by the date of alienation by the grantees of such common owner.

The cross-bill makes no case against Mrs. Tillinghast, but admits the title to have been owned by Coolbaugh and Powers, at the date of the contract with Mrs. Tillinghast. And the court, in hearing, properly dismissed it for want of equity. (Rec. p. 88).

In this case Walker was originally the common owner,

And the agreement on the part of Coolbaugh and Powers to sell to Mrs. Tillinghast cannot change the order of things because Walker chooses to assent to such contract in order to keep good faith and carry out a contract which he had made with the husband of Mrs. Tillinghast, at a time when the record shows he had no right to the property. Indeed Walker does not sign the contract with Mrs. Tillinghast, and in no manner is a party thereto.

It cannot be presumed that Mrs. Tillinghast would, after being informed as to the condition of the title, make a contract with Coolbaugh and Powers, had she not also known that she would be protected therein to the same extent as Coolbaugh and Powers would be protected.

The first part of that contract (Rec. p. 81,) recites the old original contract made with Walker, which he had no right to make, and the latter part (Rec. p. 82) sets out the new contract of Coolbaugh and Powers, wherein they agree to convey to Mrs. Tillinghast the S. ½ of Block 18, upon payment *to them* of the purchase money, after satisfaction of all liens thereon. Walker was to get nothing: he had no interest in the block.

Indeed the agreement recites, as follows: "The said "Samuel J. Walker, undertaking in this agreement *for the* "*purpose of signifying his consent to this contract, and the* "*facts herein stated, and his approval of the agreement* "*herein entered into upon the part of the said Coolbaugh* "*and Powers*"—

It is evident that if Mrs. Tillinghast takes the title from Coolbaugh and Powers, and not from S. J. Walker, that the ~~deed~~ record is strictly accurate, as said Block 18 was conveyed to Coolbaugh and Powers, before Blocks 14 and 16, were conveyed to Orvis and Ricker, and hence should be sold after 14 and 16, in order of time.

2d. But if it should be conceded that S. J. Walker did have any interest in Block 18, (which the record, in no

binding or legal manner shows, was the case), even then, Tillinghast acquired title thereto, before Orvis obtained title to block 16.

The deed to Orvis was recorded April 9, 1874. It is only notice from that time. The document introduced by them in evidence shows that Tillinghast bought Block 18 on February 9, 1874, (Rec. p. 81), two months before the deed to Orvis went of record. And further, that Tillinghast went into possession immediately, and expended $9,000 in erection of buildings, (Rec. p. 81), and then died in April, 1874, (Rec. p. 80), the month that the deed to Orvis went of record. No one will dispute that notice by possession is just as good as notice by the record.

1 Jones' Mtgs, § 600.

And, hence, Orvis had notice of the rights of Tillinghast; and the deed of Orvis going upon record after the possession of Tillinghast under his purchase, Orvis became the subsequent purchaser, and his block must be first sold.

V.

THE DEFENDANT, RICKER, HAS NOT APPEALED TO THIS COURT; STILL, AS WE ARE INFORMED, HE SEEKS TO BE HEARD. NO ERROR, AS TO HIM, CAN BE INVESTIGATED BY THIS COURT.

Tilden v. *Blair*, 21 Wall., 241.
Revised Statutes U. S., §§ 1012, 1013.

Appeals and writs of error are placed upon the same basis.

In *Tilden* v. *Blair*, this Court refused to consider an error raised by defendant in error which was admitted, because the defendant in error had not also sued out a writ. There is no such thing as a cross error being assigned in this Court.

The statute provides how both parties may be relieved, if both are dissatisfied—viz: by cross appeals.

VI.

THE ONLY OTHER ERROR WE CAN IMAGINE AS LIKELY TO BE ASSIGNED IS THIS: THAT THE N. 200 FEET OF BLOCK 16 WAS ORDERED TO BE SOLD FIRST—SUBJECT, HOWEVER, TO THE TRUST DEED OF KINNEY TO ROGERS. APPELLANT MAY CLAIM THAT IT SHOULD HAVE BEEN SOLD FREED FROM THAT INCUMBRANCE.

A mortgage or trust deed, however, stands upon the same basis of protection by the registry laws as does an absolute deed.

A mortgage is a purchase within the meaning of the recording law.

1 Jones on Mortgages, § 458.

Kinney, having purchased the property by deed from Walker, recorded on December 2, 1872, (Rec., p. 95,) is prior, in time, to appellant, who purchased from Walker by deed recorded April 9, 1874. Had Kinney, after such purchase, conveyed by absolute deed to Rogers, then it will not be denied that Rogers would occupy the position, and could claim the same position against the Powell mortgage that Kinney himself could claim. Instead of taking by deed, Rogers took by trust deed, from Kinney. This trust deed was not recorded until October 23, 1873, but it was recorded before the deed to appellant, which was on April 9, 1874. But, whatever the time of record may have been, all that was needed to occupy the same position as Kinney in regard to the inverse order, was, to have the trust deed recorded before Kinney re-conveyed to Walker the equity of redemption, which took place March 16, 1874.

There can be no doubt, therefore, that this trust deed, being prior as to date of record to appellant's deed, and being prior to the re-conveyance by Kinney to Walker, must be protected, and that the North 200 feet of Block 16, upon which it rests, was properly sold, subject to it.

REPLY TO BRIEF OF HON. M. W. FULLER.

VII.

Since the foregoing was put in type we have been handed the brief of Hon. M. W. Fuller, on behalf of Sherman A. Ricker.

We wish to reply to same so far as we may not have anticipated.

1st. We have shown that Ricker has no standing in this court. He was a defendant below along with Orvis, and has not appeared or been brought into court in any way, and cannot be heard to assign error.

2d. So far as he seeks to come in under the cover of Orvis' appeal, he must confine himself to the errors committed against Orvis, if any. In order to overcome the difficulty pointed out, as to the want of exceptions to the Master's report on the part of Orvis, counsel undertakes to show that the order of reference was not broad enough to authorize the Master to state his conclusions as to the facts in issue, or supposed to be in issue, and hence his position is that the report of the Master being unauthorized, Orvis was under no obligation to except to same.

But we do not conceive that the court will take any such view of the order of reference. The language of reference is as follows: "That this cause be referred to Henry "W. Bishop, Esq., Master in Chancery of this Court, to

"take proofs herein, and to report the same to this Court."

This is the ordinary reference, and necessarily means a report upon the facts in issue, or supposed to be in issue, not a report of the evidence into court, but of the things proved by the evidence, touching the issues. The very functions and office of the Master presupposes just such a report as we have here. And one of the questions sought to be raised by the pleadings was the question of inverse order of alienation; and upon this the Master reported his conclusions of fact, not of law, leaving it to the court to apply the law. In other words, the Master takes the place of a jury at common law, and finds the facts proved, upon which the court applies the law and enters or refuses judgment.

This being so, and the appellant, not having excepted to such report, cannot now urge any error.

Brockett v. *Brockett*, 3 How., 691.
Harding v. *Handy*, 11 Wheat., 126.

It is not a question of a mistake of the Master as to the *legal consequence of the facts*, but it is a question whether the evidence supports the facts found as to the inverse order of alienation, and as to such question of *fact*, this court will not review it, the same not having been excepted to.

3d. As to the first error assigned by Mr. Fuller. He alleges that *at the time of the decree*, *Block* 18 belonged to Samuel J. Walker, subject to the rights of the mortgagees, Coolbaugh and Powers, and Bacon Wheeler and Powell; and hence that Walker's equity should be first sold. There is no evidence that Block 18 belonged to Walker at that time: Coolbaugh and Powers held it by a warranty deed of conveyance without written defeasance. The cross-bill of Orvis admits it. The contract of September 3d, 1874, signed by Coolbaugh and Powers, (Rec. 81), shows that Coolbaugh and Powers were to

receive the full amount of the purchase price, and that Walker was to receive nothing. Mr. Fuller, on p. 16 of his brief, admits the same, viz: That after the payment or other discharge of all liens on this block, Mrs. Tillinghast shall pay "the balance of said purchase "money, if any there may be remaining of above money, "to W. F. Coolbaugh and Heman G. Powers."

Where is the interest of *Mr. S. J. Walker* in said Block 18, under said contract? Why have they not made Mrs. Tillinghast a party before they ask to sell her property without a hearing, upon which she has expended thousands of dollars?

Mr. Fuller remarks that the result of this decree would be that Bacon Wheeler, under his trust deed, would obtain his $7,500, as the Powell mortgage would be satisfied out of the blocks of Orvis, Flannagan and Ricker. And why should he not? His trust deed is prior in date and record, to the deeds to Orvis, Flannagan and Ricker.

4th. As to Mr. Fuller's second assignment of error, we have answered the same, under our point VI. The Rogers Trust Deed was recorded prior in point of time to the date and record of deed to appellant. And as to Ricker, even if he could be heard, while it is true that the date of the record of his deed, April, 1873, is prior to the date of the record of the Rogers Trust Deed, Oct. 23, 1873, yet we claim under the Rogers Trust Deed, which is from Kinney, who took and recorded the conveyance to himself, prior to the date of the conveyance to Ricker. And the Rogers Trust Deed was recorded prior to the reconveyance of the block to Walker. Rogers and those taking under his trust deed, could not know that Kinney at some time would reconvey to Walker. When Greenbaum and Foreman acquired their interest, all they had to look to was the respective dates of conveyances by Walker at the time Kinney, their grantor, received and recorded his

deed. They were not gifted with the power of prophesy, so as to be able to tell what might happen after their trust deed was recorded. Walker then had no interest in block 18, and their rights being fixed by the date of the record of the deed to their grantor Kinney, the same could not be changed by anything that might happen after the date of the record of their trust deed. Their rights could not be changed by something done by a party to whom they owed no allegiance. As well might it be said that a first mortgagee's rights could be divested after record of his mortgage, by virtue of a subsequent deed of conveyance by his grantor. Indeed, that is precisely the position of Mr. Fuller.

But it is a universal rule that an appellant cannot assign for error that which does not prejudice his rights, and which is not committed against him.

Kennedy v. *Kennedy*, 66 Ill., 190.
Havinghorst v. *Sindberg*, 67 Ill., 463.

Appellant will not claim that he has any rights as against Rogers, Greenebaum & Foreman, but only that Ricker has. Then Ricker should have appealed, and he cannot come in under Orvis and assign errors, if any, which do not injure Orvis.

5th. The 5th assignment of error by Mr. Fuller, relates to an error committed against Mrs. Tillinghast.

This is rather remarkable. It is the same question as discussed under our last paragraph. As Mrs. Tillinghast has not appealed, this court will presume that she is satisfied, and neither Mr. Orvis nor Ricker can assign errors for her. Moreover, they have never been to the trouble in the court below to make her a party, and bring her into court; so that their present sympathy in her behalf is not well founded.

How can appellant be harmed because Mrs. Tillinghast

is ordered to pay money in discharge of the Powell mortgage? It would be for his benefit, and not to his injury.

6th. Mr. Fuller has assigned an error to the effect that the *decree does not allow the statutory redemption after sale, as provided by the Illinois statutes.*

We reply that (*a*,) the question does not arise upon the record. The decree says, "That said master make his "report to this court of said sale, and of his acts and do- "ings hereunder, for approval and confirmation, and for "further direction herein."

Now we must assume that this decree is to be executed according to law. It is not ordered that a deed be delivered to the purchaser forthwith, and if the law is to the effect that such a redemption is granted, then, there being nothing to the contrary, this Court will presume that the Circuit Court will execute its decree according to law.

Burke v. *Weaver*, 71 Ill., 360.

In this last case the Supreme Court of Illinois said:

"Although the decree in general terms directs the Mas- "ter to make a deed, we cannot presume that it was in- "tended that it should be made in open and palpable vio- "lation of the law; and we think the reasonable construc- "tion to be given the language used, and the one most in "consonance with the principles of equity, is, that this duty "was to be discharged after the expiration of the period "allowed by law, within which redemption may be ef- "fected."

So in the case at bar. No deed was ordered, and hence, *a fortiori*, it cannot be presumed that the Master would not follow the law and give a certificate of sale. Besides, the Court reserves the matter "for further direc- "tion," and as it is only a matter of the execution of the decree, it will be presumed this Court will act according to law in regard to same.

(*b.*) But if this Court should deem this question to arise upon this record, then we would refer to the argument of *Mr. George L. Paddock*, filed for appellee in case No. 279, of the present term.

Brine v. *The Hartford Fire Ins. Co.*

This Court will not desire to have this question twice discussed within a few days, and as the argument of Mr. Paddock cannot be improved upon by anything we may say, we desire to adopt the same.

Respectfully submitted.

JULIUS ROSENTHAL, AND
A. M. PENCE,
Counsel for Appellees, Greenebaum et al.

CHICAGO, April 15, 1878.

IN THE

Supreme Court of the United States.

October Term, A. D. 1878.

EMERSON G. ORVIS,

vs.

NATHAN POWELL ET AL.

No. 35.

Argument on the Question of Mode of Sale.

ROSENTHAL & PENCE,
PADDOCK & IDE,
OF COUNSEL.

Chicago:
BULLETIN PRINTING COMPANY, 113 MADISON STREET.
1878.

United States Supreme Court.

OCTOBER TERM, A. D. 1878.

EMERSON G. ORVIS,

vs.

NATHAN POWELL ET AL.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Brief on behalf of Appellees upon the Question whether the Decree is Erroneous in that it does not allow the Redemption given by the Statute of Illinois in cases of Sales under Decrees of Foreclosure.

May it please the Court:

By the courtesy of counsel for appellee I proceed to offer a few considerations touching the single point above indicated. It is the point which the opinion in the Brine case, No. 273, last term (6 Otto, 627), chiefly discusses, and what is here said is in the hope that the court, in the light of the Federal statutes, may be inclined to re-examine the grounds of that opinion. It is but justice to counsel for appellees to remind the court that there are other points argued or to be argued by them which

I do not seek to pass over, and which ought not to be obscured or prejudiced by this brief.

There are two modes of examining this subject. One mode is to ignore the Federal statutes and constitution; assume that the State statutes are the only law of the case; cite the state law of 1841 as a "rule of property" inhering in all contracts made since its passage; call attention to the fact that the present was such a contract, and that in all alienations of real estate the "law of the State" must control, and thus ~~triumphantly~~ end the inquiry at its beginning.

But another and more satisfactory mode, and that I propose to follow, is to open the acts of Congress as well as the statutes of Illinois, and inquire whether there is any Federal statute giving to the Circuit court below the power of enforcing by sale without redemption its own decrees of foreclosure. Should such a Federal statute be found, and its constitutionality not questioned, it may be laid down as axiomatic that if unrepealed it will control the case as the law of the land and a "*rule of property*" in spite of any State statute whatsoever. Let us then conduct the inquiry with ~~some~~ full and direct reference to the actual existence of the United States; and to those documentary verities, its constitution and laws, as muniments of title to land in the Northern District of Illinois.

Statement.

The facts relating to the matter in hand are simple, and the provisions of Federal and State statutory law are also simple.

The state of Illinois was admitted into the Union in the year 1818. By act of Congress of March 3d, 1819 (3 Stat. 502), and under the 3d Article of the Constitution of the United States, a judicial district comprising the entire State was created, and the laws of the United States not locally inapplicable were declared to have the same force and effect within the State as elsewhere within the United States. The district so remained until 13th February, 1855, when it was divided as at present into Northern and Southern districts. On the 19th of May, 1828, final process upon decrees for sale of mortgaged lands as "used" in the courts of the state of Illinois (which courts exercised an ordinary equity jurisdiction) was by sale and conveyance of the mortgaged premises, *without redemption*. On that day was enacted by Congress the Federal process act of 1828 (4 Stat. 278) the third section whereof provided that:

"Final process on judgments and decrees rendered in any of the courts of the United States and the proceedings thereupon, shall be the same, except their style, in each State, as are now used in the courts of such State; saving to the courts of the United States, in those States in which there are not courts of equity with the ordinary equity jurisdiction the power of prescribing the mode of executing their decrees in equity by rules of court; *Provided, however*, that it shall be

in the power of the courts, if they see fit in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective States for the State courts."

This act of national legislative authority has never been repealed nor modified: either by Congress or by rule of court. Its plain terms imply that it shall continue to operate as a rule of property until so repealed or modified. Its subject matter is the alienation of property, real and personal, for the satisfaction of the judgments and decrees of the Federal courts mentioned. It contains no other time limit than the contingent one referred to: and that contingency has not happened. It is therefore still in force as the supreme law of the land.

While this act of 1828 was in full force, Walker executed to Powell the mortgage in question, and the decree of the court below was entered, ordering the land sold—the decree appealed from.

The Illinois Chancery Statute of 1833 (Revised Laws, 1833, p. 118) embodied a code of process mesne and final for the Chancery courts of the State, of which the 21st section regulated the mode of sale "in all cases where a sale of property is decreed" by requiring the court to sell for "cash" or on such terms of "credit" as might be "equitable to the interests of the several parties." The statute giving no redemption from mortgage sales under decrees, the act of 1841 was passed for that purpose.

Thus in 1841, while the act of Congress of 1828 was in

force, as stated, and before the execution of the mortgage in suit, the legislature of Illinois passed the act under which, as is claimed by appellant, it became the duty of the court below to cease conforming its mode of alienating mortgaged lands to the act of Congress of 1828, and thenceforth to conform it to the mode laid down in the State statute cited. It is conceded, we believe, by counsel for appellant, that up to 1841 the mode of sale directed in the Federal statute was binding upon those courts, and was the lawful mode of executing final process upon such decrees, and that after 1841 it might be followed as to all mortgages made before 1841. It is claimed, however, that as to all mortgages made since the State law of 1841, the State law must control the Federal courts in the execution of the final process of sale which up to that time had been executed under the Federal act of 1828. The state law reads: "In all cases hereafter where lands "shall be sold under and by virtue of any decree of a court "of equity for the sale of mortgaged lands it shall be lawful "for the mortgagor * * * to redeem," etc. This act makes no mention of any Federal courts, and is ostensibly in amendment of the provisions of the state code of procedure, but it is insisted that its legal effect is as if it especially mentioned those courts, and had read: "In all cases hereafter "where lands shall be sold under and by virtue of any decree "of a court of equity of this State or of the United States for "the sale of mortgaged lands, it shall be lawful for the mortga-"gor to redeem," etc. It does not seem to be conceded that the omission by the State legislature of any express reference to the courts of the United States is in any way an argument that it was not intended to include them.

It appears by the record that this is a proceeding *in rem* to obtain by sale of the mortgaged lands a satisfaction of the mortgage debt. The lands lie in that part of the United States called the Northern District of Illinois, and are therefore within the territorial jurisdiction of the court below.

I.

THE REMEDY OF THE MORTGAGEE IN THIS CASE ALLOWED BY THE DECREE APPEALED FROM, IS GIVEN BY THE ACT OF CONGRESS OF 1828, WHICH PRESCRIBED, IN LEGAL EFFECT, THAT SALES OF MORTGAGED REAL ESTATE UNDER DECREES OF THE CIRCUIT COURT OF ILLINOIS SHOULD BE WITHOUT REDEMPTION, UNTIL A DIFFERENT REMEDY SHOULD, IN THE CONTINGENCY SPECIFIED, BE ADOPTED BY RULE OF THE FEDERAL COURT. SUCH DIFFERENT REMEDY NEVER HAVING BEEN ADOPTED BY THE FEDERAL COURT, THE ACT OF CONGRESS OF 1828 CONTINUES TO FURNISH THE REMEDY "USED" IN THIS CASE. THE LEGISLATURE OF ILLINOIS, BY THE ACT OF 1841, HAS NOT TAKEN AWAY, NOR HAS IT POWER TO TAKE AWAY A REMEDY GIVEN BY THE ACT OF 1828, OR ANY OTHER ACT OF CONGRESS, TO SUITORS IN THE FEDERAL COURT OF ILLINOIS.

is a part of the law of the state of Illinois *

*

I therefore desire, at the outset, to be understood as resting the right of the appellees on this point upon the express unrepealed, unmodified statute of the United States, fixing the mode and effect of sales under decrees in the court below.

Act of Congress of May 19, 1828; 4 Stat. 278.

*

The chief obstacle in the way of the present argument is, of course, the case of Brine. The opinion of the court in

* U.S. Rev. Stat. 1874 § 5597 § 913.

that case is remarkable in that the statute of the United States above cited—although called to the attention of the court—is not discussed, but passed over in silence as if unnoticed or inapplicable. The opinion is remarkable also for what seems to counsel a grave inadequacy in the statement of the grounds taken by the Hartford Company. The court, in that connection, say that the force of the State statute of redemption was denied "On the ground that the equity practice "[of the Courts of the United States] is governed SOLELY by "the precedents of the English Chancery court as they "existed prior to the Declaration of Independence; and by "such rules of practice as have been established by the "Supreme court of the United States or adopted by the "Circuit courts for their own guidance. And treating all "the proceedings subsequent to a decree which are necessary "for its enforcement as matters of practice, and as belonging "SOLELY to the course of procedure in courts of equity, it is "said that not only does the means of conducting the sale "under a decree of foreclosure and all the incidents of such a "sale come within the rules of practice of the court, but that "the effects of such a sale on the rights acquired by the "purchaser and those of the mortgagor and his subsequent "grantees are also MERE MATTERS OF PRACTICE to be regu-"lated by the rules of the court AS FOUND IN THE SOURCES "WE HAVE MENTIONED."

Under such circumstances we venture to express the hope that the court will not decline, but rather welcome the opportunity to consider and discuss the force of the Federal statutes cited in addition to those "mere matters of practice."

which in the Brine opinion are taken and stated as the sole ground of appellee's position.

The opinion in the Brine case is based upon the rule as announced by the court, "that all the means by which the "title to real property is transferred whether by deed, by will "or by judicial proceedings are subject to and may be gov- "erned by the will of the State in which it lies, except where "the law of the State on that subject impairs the obligation "of a contract."

What is meant by law of the State?

There is no fault to be found with the above "axiom" if in the terms "law of the State," "will of the State" are included those laws of the State, and those emanations of will which are of Federal origin and relation, *i. e.* acts of Congress. Nor is there any objection to the exception to the axiom if that exception includes within its prohibitions such State laws as are in derogation of remedies given by Federal laws. In that form the rule, as we submit, expresses the entire law of title to realty, and has our heartiest approval.

But such, we take it, was not the broad sense in which the rule was laid down. It was intended to include, as we understand it, only the local law and acts of the State legislature; in which one-sided sense it seems self-evidently untrue, and no axiom at all.

For example, a Federal occasion arises for diminishing the amount of every existing real estate mortgage in the Union, and Congress passes a legal tender act which upon antecedent contracts has that operation. Again, a Federal

occasion arises to sell land in the State of Virginia for non-payment of a direct Federal land tax (act of 1862), and the sale is held by this court to cut off all pre-existing interests in the land under the laws of the State of Virginia. (*Turner v. Smith*, 14 Wall. 569.)

"We are of opinion, therefore," says Mr. Justice Miller, speaking of the above sale and for this court, "that the sale "being a valid one, the rent charge of the defendant in error "was cut off and destroyed by it."

And again, another Federal occasion arises to sell land; X and a Congressional act is passed to confiscate the real estate of the citizen, and it is done. In all these and other cases which could be named, the Federal law acts upon the land with reference to its Federal *situs*, and without reference to its local *situs* or to the law of the State in the limited sense in which that term is used in the Brine opinion. ~~A distiller's land is sold in Illinois under Federal revenue law. Is there any redemption from the sale by virtue of a so-called "State law"?~~ The Constitution of Illinois provides that the order or judgment of some court of record shall be a pre-requisite to a sale of lands for taxes and assessments. Is that binding on Congress? Suppose the "State law" provide that ~~in all cases of sales of distilleries for violation of revenue law, there shall be a redemption of two years, and~~ that the redemptions given by Congress from sales under the direct tax law shall be doubled or trebled in duration; what is the effect on the Federal proceedings? Suppose the "State law" authorizing sales of land to pay mortgage debts be wholly repealed. Will the Congress of the United States be

X See also 18 How 272 — Murray's Lessee v Hoboken Co. — a case of alienation by federal power without reference to "state law"

powerless to enact a new code of procedure for the sale of such land in its own courts? This question must be met, because if the so-called "State law" can modify the power to sell by imposing the condition of redemption, it can take away the power to sell altogether. It is in this point of view that the doctrine of the Brine case seems so startling and so unsound.

The doctrine of the Brine case, when for the first time collated with the act of Congress cited, reduces that act from an original act of Federal legislation to a mere declarative statement of a prior and paramount "State law," to stand only so long as the State law shall stand: a sort of opinion. The true doctrine is, as we most respectfully submit, that the Federal occasion for taking real estate to satisfy Federal judgments and decrees furnished the reason for the act of 1828, and that such occasion continues till Congress sees fit to surrender the power. The necessities and means of this Federal occasion are matters of mere legislative discretion in Congress under the "judicial power" of the constitution. The Federal means for meeting this Federal exigency are as carefully guarded in the statute of 1828 from State control as any other measures, e. g., the means of raising revenue, the means of punishing traitors—some of which, as we have seen, have quite as important relation to the tenure and alienation of real estate as the act of 1828, or the State statute of 1841.

It will be apparent at a glance that these modes of alienating realty neither originate in "State laws" nor have the slightest relation to "State laws." *They are Federal modes of alienating land for Federal purposes under Federal statutes,*

and by Federal agencies. Reference to these, and others, being modes of alienating lands totally independent of State law, is enough to show the fallacy of resting the present discussion upon the so-called "axiom" above alluded to. The fatal difficulty with the axiom as a solution of the question at issue, is that when restricted to but a part of the law of the *situs*, viz., the State law, it is untrue; and when extended to both laws of the *situs*, it does not enable us to ascertain those laws. That can only be done by further inquiry; and we find that instead of answering a question we have only asked one.

The case of *Branson v. Kinzie*, 1 How. 311, containing the well-known dictum of Chief Justice Taney, was decided in this court in 1843. The opinion contains, however, in the language of that great judge, this clear statement of the effect of the act of 1828: "The laws of a State regulating the "process of its courts and prescribing the manner in which "it shall be executed, of course, do not bind the courts of the "United States, whose proceedings must be governed by acts "of Congress. The act of 1792, however, adopted the pro- "cess used in the State courts as it stood in 1789; and since "then the act of 1828, on the same subject, has been passed; "and the 3d section of this law directs that final process issued "on *judgments and decrees* in any of the courts of the "United States, and the proceedings thereupon, shall be the "same, except their style, in each State respectively, as were "then used in the courts of such State, and authorizes the "courts of the United States, if they see fit, in their discre- "tion, by rules of court, so far to *alter final process as to* "*conform the same to any change which might afterwards be*

"*adopted, by the legislatures of the respective States for the* "*State courts. Any acts of a State legislature, therefore, in* "*relation to final process, passed since* 1828, *are of no force* "*in the courts of the United States, unless adopted by rules* "*of court, according to the provisions of this act of Congress.* "And, although such State laws may have been so adopted, "yet they are inoperative and of no force, if in conflict with "the constitution or an act of Congress."

The case of *McCracken v. Hayward*, 2 How. 608, was decided in this court in 1844, one year after the Bronson-Kinzie case. Its subject matter was the same as that of that case, viz. the power of the Federal court to sell real estate in Illinois in satisfaction of its own judgments. It was a common law suit, while Bronson-Kinzie was a chancery suit, but the same act of 1828 was in question in both; for that act as we have seen put final process on "judgments" at law on the same footing as final process on chancery "decrees." It follows that if the later case is an authority in favor of the inviolability of the Federal power over lands to be sold under Federal process for the satisfaction of Federal judgments, it is equally in point as the power of the Federal courts to sell land under Federal process for the satisfaction of Federal decrees.

This later case of *McCracken v. Hayward* discusses the inviolability of Federal process under two aspects.

"1. In reference to the Constitution. 2. The laws of "the United States as the tests of the validity of the law "of Illinois and the rule of court, which it is said affect "only the remedy but not the right of the plaintiff arising

"on the contract between the parties and the judgment "rendered upon it."

After referring with approbation to the case of Bronson-Kinzie as settling the first point or aspect, against the constitutionality of the State valuation law, the opinion of the court proceeds: "The second aspect in which this case must be "considered is with reference to the acts of Congress relating "to process and proceedings in the courts of the United "States in cases at common law."

"All the early laws on this subject were carefully and most "ably reviewed by this court, in *Wayman* and *Southard*, and "the *Bank of the United States v. Halstead* in which it "was held, that the proceedings in the courts of the United "States should be the same as they were in the several States "at the time of passing the acts of Congress, subject to be "altered by the Circuit courts, or regulations of the Supreme "court; that proceedings on executions were to be governed by "such laws until final satisfaction was obtained, regardless of "any subsequent changes by State legislation. (10 Wheat. "20, 51.) Prior to 1828 Congress had passed no process acts ap- "plicable to the States admitted into the Union after 1789. To "remedy this defect and to conform to the decisions in the above "cases, the act of May, 1828, directed that writs of execution "and other final process issued on judgments and decrees, and "the proceedings thereupon, shall be the same in each State as "are now used in the courts of such State, etc.; thus adopting "the same principles which had been established by this court "in construction of the acts of 1789 and 1792. Consequently "no State law passed since May, 1828; can have any effect on

"the proceedings on executions issued from the courts of the "United States, unless such laws are adopted by those courts "under the proviso in the third section of the act. The rule "adopted by the Circuit court of Illinois does not fall within "this proviso, which declares, that it shall be in the power of "the courts, if they see fit in their discretion, so far to alter "final process in said courts as to conform the same to any "change which may be adopted by the legislatures of the "respective States for the State courts."

((This authorizes the court to adopt the change so made by a State law, but not to adopt it only in part, or alter it in any respect. The law directs the appraisement to be made by three householders, one to be selected by the defendant, one by the officer, and one by the plaintiff, without any authority to any two to make it, and, consequently, requiring the concurrence of all. The rule of court adopting this law provides, "That any two of the three householders selected "under the law agreeing, may make the valuation required." Such an adoption is not warranted by the act of 1828; it is legislation in effect, by prescribing a new rule unknown to any act of Congress, or the State law professedly adopted. But had the adoption been in the terms of the law, it could not be recognized, inasmuch as the appraisement therein directed, with the prohibition to sell at less than two-thirds of the valuation, is repugnant to the Constitution of the United States. It also conflicts with the process acts, as construed in *Wayman v. Southard*, and the *Bank of the United States v. Halstead*, and the repeated decisions of this court in later cases, that no State law can be adopted under the act of 1828, which is in collision with any act of Congress. 16 Peters, 94, 312-314.))

Thus in *McCracken v. Hayward* this court consider the question as well with reference to the law of Federal process as with reference to the law of State process. The court cite with approval the decisions in 10 Wheaton, the principle of which was and is that whether constitutional or not, the State law was not operative; the execution of the power to sell lands being governed by the act of Congress. Upon these authorities and the Federal statute of 1828 there is absolutely no room to raise a distinction on the basis of the date of the contract, and to argue that if later in date than the State statute, that statute has given a new remedy, which takes away a remedy pre-existing under an unrepealed act of Congress. Such an argument contains the assumption that the act of Congress is not in a legal sense the "law of the State or place," and is repealed by the act of the State legislature.

Mr. Justice Catron, in *McCracken v. Hayward* says: "It" [the act of 1828] "repealed all rules made by the courts "of the United States regulating final process in all the dis- "tricts and adopted the execution laws of the respective "States *as they then stood;* and if nothing more had been "done, future legislation on the subject by the States would "have been CUT OFF. Congress, however, foreseeing new "States might come into the Union to which the act would "not apply, and that it might be proper to adopt future State "laws in the EXISTING STATES, provided that it should," etc

The assumption that in some way the Federal remedy has been in this case superseded by the statute of the State is in flat contradiction to the perpetuating clause of the act of 1828, which, as we have seen, provides that the Federal

remedy shall not be superseded, but shall remain in force to the present time. If so, priorities and subsequencies, and times and seasons in State acts have no force or meaning. The adoption by Congress of the Illinois State process in 1828, was as much independent legislation as if it had enacted the Indiana State process and given to the Indiana district the Illinois process; or had given to both the process of the Code of Louisiana.

That this matter of final process in Federal courts is matter of Federal legislative policy, and not a question of Federal power, appears as plainly in the opinion of this court in the recent case of *Moncure v. Zants*, 11 Wall. 421, rendered by Mr. Justice Miller, as in the earlier opinions in the cases cited in the Brine case—rendered by Chief Justice Marshall, by Justices Story, Baldwin, McLean and others. Mr. Justice Miller in *Moncure v. Zants* was speaking of a Federal process act for that part of the United States then in question, viz. Ascension Parish in Louisiana. The question was whether land was validly sold on execution from the Federal court if not sold according to the act of Congress of May 26, 1824, but sold according to a later Federal statute of 1867. The earlier statute adopted for the Federal courts the local mode of procedure, and the later, if held applicable, changed that mode in respect to the manner and place of advertising execution sales of real estate under Federal judgments. "The act of Congress of May 26, 1824," says Mr. Justice Miller, "declares that the mode of proceedings in civil "cases in the courts of the United States, that now are or here- "after may be established in the State of Louisiana, shall be

"conformable to the laws directing the mode of practice in the "District courts of said State, and though there is a provision "authorizing the judges of those courts to make alterations "necessary to conform the practice to the organization of the "Federal courts, this authority is quite limited. This statute, "then, in establishing the practice of the State courts as the "practice of the Federal courts, however the State laws may "modify that practice, and in limiting the power of the Federal "courts in that State over their own rules of practice, is a de- "parture from the otherwise uniform action of Congress on that "subject. The mode of procedure in the courts of Louisiana "conforming very nearly to those of the civil law, and both the "code of procedure and the civil code of that State, differing so "widely from the system of common law adopted in all the "other States, was the reason of this special purpose of Cong- "ress to require the Federal courts of that State to conform to "the usages of the local law."

With reference to the claim that the second section of the act of Congress of 1867, laid down the rule for advertising the sale, and had been followed by the marshal in executing the process the court say: "If the language of the "section were much more favorable than it is to the construc- "tion contended for by the defendant in error, we should "pause long before concluding that Congress had reversed in "this instance its uniform policy of conforming the modes of "proceeding in the Federal courts to those of the States, and "had repealed *pro tanto* the act of 1824, which laid down "that as the law for Louisiana with an express limitation in "the power of the court to modify it, and that it had invaded

"the rule long received as an axiom, that the descent, aliena-
"tion and transfer of real estate was governed rightfully by
"the law of the State wherein it lay. We are quite satisfied
"that Congress had no such intent in passing the act of
"1867."

The inference we cannot help drawing from the above is that the court recognize the authority of Congress over the subject of alienation by process of the Federal courts as fully as such power can be claimed, but after examining the statutes, they conclude that the authority was not exercised in the given case. We beg that the present inquiry may be conducted in the same manner, whatever its result.

What then, after all, is meant by "LAW OF THE LAND," "LAW OF THE PLACE," "LAW OF THE STATE," "LEX LOCI REI SITÆ?" Not until this question is solved will the "axiom" on which the Brine opinion bases itself be of any use.

Given a duality of governmental systems, each vested with sovereign powers—legislative, judicial and executive—whether over different peoples and territories or over the same people and territory, there at once arises a duality of relation in every person and thing within the territory. Such a dual system is presented in the Federal and State sovereignties of the Union. The *situs* or situation of land being a geographic fact, comes within the operation of this law of duality as much as the status of the citizen or any other fact.

Land in Illinois therefore has not its situs in the United States alone, nor in the State alone, but in either, according to the occasion and the relation in which it stands. If it is

subject to the Federal law its situs is Federal: if to the State statute, its situs is local.

These positions seem clear upon principle as well as upon the purview of the Federal real estate statutes as to taxes, etc., to which allusion has been made.

Another and perhaps the most important limitation upon the axiom in the Brine case, so far as Illinois is concerned, is found in the acts of congress known as bankruptcy laws. It is a limitation peculiarly pertinent, because those laws are laws of Federal process, whereby the Federal courts are vested with a power of sale of realty in the States under the constitution, to the utter exclusion, at least during the period of its exercise, of all so-called "State law" whatever. It is pertinent also because many thousands of assignee's deeds have been made in Chicago, vesting and divesting real estate of bankrupts without reference to "State laws." The powers of Congress to confer jurisdiction, and the nature of the jurisdiction conferred by the last bankrupt act have been repeatedly and fully declared in this court. *Rag v. Norsworthy*, 23 Wallace, 128, is one of many cases which exemplify the Federal jurisdiction over real estate, independent of any "State law." In that case the jurisdiction is maintained "as beyond all doubt," referring to the jurisdiction to sell land free of the lien of a mortgage made under the "State law," proper notice to the mortgagee having been given. When the sale is made it is made under the Federal "judicial power," and with no more reference to the process acts of the State than to the laws of China. If made in Illinois, no redemption under the act of 1841, so far as we know, has ever been claimed in favor of the

mortgagor, whose equity of redemption under the mortgage has been cut off by the deed of the assignee. Why? Because the law of Congress giving the power to sell is a part of that LAW OF THE LAND OR LAW OF THE STATE which in the entire series of cases cited in the Brine opinion is held to be the criterion of power and the "rule of property."

If we have a case like 7 Cranch 115, and the others cited as "State law" cases by Mr. Justice Miller, we have cases where, no Federal statute being invoked as the source of a power to sell realty, the so-called State law, that is the State law in the limited sense, the statute of the State, embodies the whole law of the place. The Fox case, 94 U. S. 315, was such a case, and it to our mind rests not on the lack of power or capacity in the United States to take land by devise *under any circumstances*, but the lack of a Federal occasion provided by Federal law for the exercise of such a power.

There being no Federal statute and no Federal purpose to subserve in the devise, and therefore no law except the New York act, it was well held by this court that the sole question was the validity of the devise under the statute of that State. Holding that the word "person," as used in that statute, did not include a corporation not created under the laws of the State, viz., the United States, the devise was held void.

Says Mr. Justice Field: "The power of the State to "regulate the tenure of real property within her limits, and "the modes of its acquisition and transfer, and the rules of its "descent and the extent to which a testamentary disposition

"of it may be exercised by its owners is undoubted. It is an "established principle of law everywhere recognized arising "from the necessity of the case that the disposition of im- "movable property, whether by descent, deed or any other "mode, is exclusively subject to the GOVERNMENT WITHIN "WHOSE JURISDICTION THE PROPERTY IS SITUATED. *Mc-* "*Cormick v. Sullivant*, 10 Wheat. 202. The power of the "State in this respect follows from her sovereignty within "her limits AS TO ALL MATTERS over which jurisdiction has "not been expressly or by necessary implication transferred "to the Federal government." This, then, is "the axiom of the Fox case" laid down in 1876, and again we say it is true and embodies the whole law of real estate alienation. It, to our mind, differs essentially from the Brine axiom because, as we have pointed out, that axiom does not on its face nor in the context admit the possibility that a Federal power or statute may become a part of the *lex loci rei sitæ*. Had the court in the Brine case made that qualification (as it seems to us was made in the Fox case and the other "State law" cases cited in this brief) they would, we think, have proceeded to examine the Federal statutes, and to adjudicate whether the Federal statute we invoked as applicable, was really applicable in law. They also would not have fallen into such a serious misunderstanding of our views as to suppose that we rested our case solely on rules of the Supreme and Circuit court, and on certain transactions in England prior to the Declaration of Independence.

"It must always be borne in mind," say this court, by Mr. Justice Swayne, in *Bank v. Dearing*, 1 Otto 35, "that "the constitution of the United States, and the laws which

"shall be made in pursuance thereof, are the supreme law of "the land (Const. Art. 6), and that this law is as much a part "of the law of each State, and as binding upon its authorities "and people as its own local constitution and laws."

Again, they say in *Claflin v. Houseman*, 3 Otto 136, "The laws of the United States are laws in the several States, "and just as much binding on the citizens and courts thereof "as the State laws are. The United States is not a foreign "sovereignty as regards the several States, but is a concurrent "and, within its jurisdiction, paramount sovereignty. Every "citizen of a State is a subject of two distinct sovereignties, "having concurrent jurisdiction in the State—concurrent as "to place and persons, though distinct as to subject matter. "Legal or equitable rights, acquired under either system of "laws, may be enforced in any court of either sovereignty "competent to hear and determine such kind of rights, and "not restrained by its constitution in the exercise of such "jurisdiction."

These general declarations of the court give ground for the position that if the process of the courts of the United States is matter of Federal relation, any statute on the subject of federal process is a part of the law of the State in which lie the lands to be taken upon such process.

What Impairment of Remedy is Meant?

We do not understand that this court judicially determined that Bronson's or McCracken's *remedy in the State court* was impaired, but that his remedy in the Federal court was unconstitutionally impaired by the act of 1841, whether

that act was adopted or not. What remedy? The court must have had in view the act of 1828 as furnishing the remedy. In the McCracken case it is said by this court that "the marshal can do under the authority of the law whatever "he could do under the fullest power of attorney from the "judgment debtor; and no State law can prohibit it." What the court say as to the "existing laws of Illinois," as being a part of the contract plainly refers to the act of 1828 adopting those laws because at the time in point, viz., the date of the contract, the act of 1841 had not been passed. Thus the conclusion is the same, whether the State act be held unconstitutional, or whether the federal act be held the only one in force. The State legislature can neither impair a federal remedy nor control the final process of the Federal courts. It is the Federal remedy and the Federal process which are in question in Federal courts.

The litigant in the Federal court therefore has the same right to treat the Federal process acts as part of the obligation of the contract as the litigant in the State court has to treat the State process acts as part of its obligation. Thus the mortgage of Walker was modified as well by the act of 1828 as by that of 1841, and he must be held to have contracted with reference to the right of Powell to avail himself of any one of the numerous courts and remedies open to him. He cannot therefore complain of the selection of the Federal forum with its long settled modes of final procedure because they differ from those of some other forum.

Is Process Process? Do the Words "Final Process," "Mode of Executing Decrees," Mean Now What They Meant When Originally Used?

Nor can it be said that the act of the court below, through its master in selling the land of Walker to satisfy the decree, is not "final process on judgments and decrees" and "a mode of executing decrees" within the purview of the act of 1828. If it is not what is it? If it was final process and a mode of execution within the meaning of the act of Congress up to the year 1841, as all concede it to have been, what has since happened to change that meaning? It is conceivable perhaps that the State legislature may have repealed the act of Congress, but it is not conceivable that without repealing it they have changed its meaning. Let us, therefore, not say that up to 1841 the act of sale without redemption to make the money decreed to be due was "final process" and "a mode of executing decrees," but that after that year by reason of some change in the meaning of those words in the act of 1828 it became something else.

Story's Equity Pleadings, § 408a: "Thus, for example, a decree of foreclosure and sale upon a bill brought by a mortgagee for foreclosure and sale * * is final; and the sale is but in the nature of an execution."

Whiting v. Bank U. S., 13 Peters 15 (1839), the Supreme court of the United States said of a decree of mortgage foreclosure and sale that "the ulterior proceedings are but a mode of executing the original decree like the award of an execution at law." Thus we have this court holding as late as

1839 that the ulterior "proceedings" on the decree, viz., the sale of the mortgaged premises, are but a mode of execution. And "mode of executing decrees" and "proceedings" and "process" are the identical words of the act of 1828. If this was what the act of 1828 meant in 1839, it is what it means to-day.

Some Cases Cited by Appellant.

The case of *United States v. Crosby*, 7 Cranch 115, referred to in the Brine opinion does not seem to apply, because it simply holds that the law of Massachusetts was the law of the place governing the land sale and deed of Nelson to Dowse; and that an instrument without a seal was not a valid conveyance under that law, notwithstanding it might have been valid under the law of the West India Island where made, if it had related to land in that colony. No Federal statute or jurisdiction being in question, we do not see how the case could have been decided otherwise. The State act was the only law of the place.

How Justice Story or Chief Justice Marshall would have decided it had the United States set up a tax title under a Federal tax law does not appear, but from his utterances in other cases may be shrewdly surmised.

The case of *Clark v. Graham*, 6 Wheat. 577, also referred to, is like that in 7 Cranch, in the material respect that it held a deed invalid for lack of a formality required by the law of the State where the land lay, viz. signature of two witnesses. Here again no Federal statute was in question, and the State act was the only law of the place. And

so in the case of *McCormick v. Sullivant*, 10 Wheat. 192, which held that "no estate could pass to the daughters of William Crawford, under his will, until the same should be duly proved according to the laws of Virginia, where the land to which he was entitled lay at the time of his death, or of the Territory of Ohio after the cession of Virginia to the United States, * * * or according to the law of that State." This is a statement of the effect of a transaction in which neither the process act of 1828 nor any earlier process act is drawn in question. We most respectfully suggest that we fail to see how it tends to elucidate the position taken by the court.

The same may be said of the case of *Watts v. Waddell*, 6 Peters, 389, in which the court say a question arose "very much like" that of the Brine case. We have, as in duty bound, carefully examined that authority. The remark we propose is that the case turns upon the obvious lack of power in the Circuit court of one Federal district to control the title to land lying beyond its territorial jurisdiction. The fact was that the court was in one jurisdiction and the land in another, and both the court and the land were immovable. Had the district of Kentucky included the State of Ohio, or had Congress expressly conferred upon the court of the Kentucky district a power to execute its process in Ohio, and title been claimed under such circumstances, the case would be different. The case not presenting this feature, we regard it as only applicable upon the assumption that the act of Congress is no part of the "law of the State." We offer the same remark as to the cases of *McGoon v. Scales*, 9 Wall. 23, *U. S. v. Fox*, 94 U. S. 315, both of which are alluded to in the

opinion. We cannot perceive the most distant allusion to any Federal process act, or other Federal power of sale, in the facts of either of them. If there was no Federal law involved, then, of course, the Federal law was no part of the law of the place.

As to *Clark v. Reyburn*, 8 Wall. 318, the opinion was rendered by Mr. Justice Swayne, and seems to treat the equity process act of Congress of 1792 and the 90th equity rule as applicable and as part of the law of the place. Moreover, it was not a case of sale at all, but of strict foreclosure. We therefore fail to perceive how it supports the idea that the law of Kansas furnished the sole means of alienation.

Similar criticisms are due, as we believe, to all the cases cited by counsel for appellant, with the purpose of illustrating the axiom touching the law of place. They are one and all, so far as our examination extends, and so far as they sustain the Brine axiom, cases where the FEDERAL STATUTES were not in question.

We submit that the statute of 1828 is yet in force; that it gives a remedy upon the present contract, and is part of the law of the State of Illinois as to all lands lying within the northern district. We still hold that no inquiry as to the law governing this matter is complete which ignores those plain and energetic provisions of Federal law to which we have referred. We sincerely trust, therefore, that the court will well consider the consequences to its own jurisdiction and the rightful authority of the United States in which this land lies, before it permanently adopts a different conception of the process and power of the Circuit courts of that country.

This is not asking much with reference to the conservation of powers which up to the present moment have for a generation been carefully and constantly exercised by wise and careful judges dwelling in our State, and familiar with every fact in its history and jurisprudence.

We ask more, and that is that this court make not itself the agent for the surrender of those great and necessary powers exercised up to the Brine case by Federal judges in Illinois, as incident to the sovereignty of the United States, and as part of the "judicial power" vested in them by the act of Congress, under the constitution. We ask that the constitution of the United States and the act of Congress of 1828 be held by the court as a part of that "WILL OF THE STATE" or "LAW OF THE STATE," which in the Brine case is said to enter into the obligation of contracts; to measure the power of alienation of land, and to govern the mode of its exercise. Finding upon the face of the act of 1828, in black and white, the most ample authority for a sale without redemption, we most respectfully submit that the decree below be not disturbed because a sale without redemption may have been decreed.

Geo. L. Sandoz
Sol'r for appellee.
Rosenthal

No. 288.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1877.

In Equity.

EMERSON G. ORVIS, *Appellant,*

vs.

NATHAN POWELL, ET AL., *Appellees.*

Appeal from U. S. Circuit Court, Northern District of Illinois.

BRIEF OF JOHN P. WILSON.

ON BEHALF OF NATHAN POWELL, APPELLEE.

CHICAGO:
JEACH, BARNARD & CO., LEGAL PRINTERS, 194 RANDOLPH STREET.
1878.

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BRIEF ON BEHALF OF NATHAN POWELL, APPELLEE.

MAY IT PLEASE THE COURT:

STATEMENT OF CASE.

On the 23d day of July, A. D. 1874, Nathan Powell filed his bill in chancery, to foreclose a real estate mortgage upon the S. ½ of the N. E. ¼ of the S. W. ¼ of Sec. 5, Town 38 N., R. 14, E. of 3d P. M., executed by Henry H. Walker to complainant, to secure a promissory note of $40,500, executed and delivered to him by Henry H. and Samuel J. Walker. The mortgage bore date April 8th, 1869, and was filed for record May 25th, 1869, in the recorder's office of Cook County, Illinois.

On September 12th, 1870, a release of the north half of said premises from the effect of said mortgage, was executed, and filed for record on September 19th, 1870. (See Rec., p. 94.)

Only $14,853.33 of said mortgage remains unpaid. (Rec., p. 86.)

On September 30th, A. D. 1870, after the execution of said release, the premises described in said mortgage were subdivided, and a plat thereof filed for record. (Rec., p. 94.)

The portion released from the mortgage is now represented by Blocks 7, 8, 9, 10, 11, 12.

The portion upon which said mortgage still remains a lien is represented by Blocks 13, 14, 15, 16, 17, 18, upon said plat. (Rec., p. 65.)

It was stipulated in the case that the abstract of title offered in evidence truly represents the record of the different instruments thereby shown, and also the dates of filing the same, and that the same might be used as evidence in lieu of the original documents, subject, however, to contradiction by any competent evidence. (Rec., p. 62.)

The various instruments showing title were put in evidence, but no controversy arises as to the correctness of the abstract of title, with reference thereto. We, therefore, refer, for convenience, to the abstract. (Rec., p. 94, *et seq.*)

H. H. Walker conveyed various blocks, as appears from that abstract, to various parties, at different times.

H. H. Walker conveyed the whole tract to S. J. Walker, by quit-claim deed, dated April 12th, 1870, and recorded September 19th, 1870. (Rec., p. 94.)

It seems, from the testimony of S. J. Walker, that H. H. Walker held the title for him, (Rec., p. 70.) but they also seemed to hold the title indifferently, sometimes one and sometimes the other holding the same. S. J. Walker testifies that he was under obligations to pay the mortgage, (Rec., p. 70.) and H. H. Walker was under obligations to

pay it, as he executed the same; so that H. H. and S. J. Walker are to be treated as identical.

We will follow the inverse order of alienation, and give the latest conveyances first, their date, and date of record:

1st. North 201 feet, Block 16, Henry H. Walker to William Flannigan. Warranty Deed. Date Feb'y 27, 1874; filed for record April 15, 1874. (See Rec., p. 95.) Subject to trust deed, described under No. 4, following.

2d. South 100 feet, Block 16; Henry H. Walker to Emerson G. Orvis; Warranty Deed; dated Feb'y 26, 1874; filed for record April 9, 1874. (Rec., p. 95.)

3d. Block 14. Samuel J. Walker to Sherman A. Ricker; Warranty Deed; dated Feb'y 25, 1873; filed for record April 5, 1873. (Rec., p. 95.)

4th. Block 16. Samuel J. Walker to John D. Kinney; Warranty Deed; dated Nov. 25, 1872; filed for record Dec. 2, 1872. (Rec., p. 95.)

Kinney, the grantee, at same time, executed and delivered his note for $12,000 to S. J. Walker, due three years after date, for purchase money, and to secure the same, executed his trust deed to Rogers, bearing same date as the deed by Walker to Kinney, upon same premises. The trust deed was not recorded until October 23d, 1873, (Rec., p. 96,) but Kinney still held the title at the time of its record, and up to March 6th, 1874, when he conveyed the equity of redemption to same block back to H. H. Walker, by quit-claim deed, recorded March 16th, 1874. After this conveyance, and after the record of the trust deed in question, H. H. Walker conveyed to Flannigan and Orvis, in the order above named. The $12,000 note secured by trust deed, executed by Kinney, was sold to Greenebaum & Foreman. (Rec., p. 70.) The South 100 ft.

of Blk. 16 has been released from trust deed, Kinney to Rogers.

5th. Blocks 13 and 18. Samuel J. Walker, &c., to W. F. Coolbaugh and Heman G. Powers; Warranty Deed; dated July 1, 1872, and filed for record Dec. 7, 1872. Several other blocks were conveyed to Coolbaugh at same time, but were afterwards re-conveyed.

6th. Block 15. S. J. Walker to Patrick Brennock; Warranty Deed; dated March 18, 1872; Recorded Oct. 10, 1872.

7th. Block 17. S. J. Walker, &c., to Robert W. Ralston; Warranty Deed; dated Oct. 2, 1871; recorded Sept. 4, 1872.

This completes the list. The court, in its decree, ordered the premises sold in the order above indicated, which is strictly the inverse order of the date of alienation, or of the date of record of the several deeds, as shown by the abstract of title in evidence. (Rec., p. 95.)

Appellant, Orvis, seeks to reverse the decree, claiming that the court erred in not ordering the South half of Block 18 sold prior to the sale of the South 100 feet of Block 16, which he owns.

Orvis, the appellant, did not except to the report of the Master, as to the order of sale.

Orvis, the appellant, did not join the other defendants who own the remainder of the premises, with him, in his appeal, nor does he show any excuse for not so doing, nor does he cause a writ of summons and severance to issue to the other defendants. The other defendants are not parties to this appeal, and yet appellant claims the right to have his case adjudicated piece-meal. Orvis has not filed a cross-bill against all the other defendants, to litigate with them the inverse order of alienation.

Orvis does not claim that complainant, Powell, is not

entitled to the amount so found due to him, nor does he claim that complainant's mortgage is not a first lien upon all said blocks. His sole complaint is against his co-defendants, whom he has not brought here, and against whom he has not filed a cross-bill.

Ricker excepted to the master's report, but he did not appeal from the decree, though we are informed that he will urge a reversal. Ricker has no standing in this court.

I.

THE NON-JOINDER IN THIS APPEAL, OF WILLIAM FLANIGAN, SHERMAN A. RICKER, AND THE OTHER DEFENDANTS, NO CAUSE BEING SHOWN THEREFOR, AND NO SUMMONS AND SEVERANCE OF PARTIES DEFENDANT, IS A FATAL OBJECTION TO THE JURISDICTION OF THIS COURT.

Ozwings v. *Kincannon*, 7 Pet., 399.
Wilson's Heirs v. *Ins. Co.*, 12 Pet., 140.
Williams v. *Bank*, 11 Wheat., 414.
Masterson v. *Herndon*, 10 Wall., 416.
Simpson v. *Greeley*, 20 Wall., 152.

There is no contest between Flanigan, Orvis & Ricker. Their deeds are filed for record, April 15, '74, April 9, '74, and April 5, '74 respectively, and no error can be assigned by appellant, that the decree as to the interests of those three defendants, is not in the inverse order. But if there be any error in the decree, it is that the Tillinghast block, the S. ½ of 18, was not ordered to be sold first, and thus save the sale of Blocks 14 and 16, owned by Flanagan, Orvis & Ricker. Their interests in this decree are identical.

In *Ozwings* v. *Kincannon*, this court held that, "the ob-"jection (of non-joinder) may be taken at any time before

" judgment, on the ground that the case is not legally be-
" fore us, and that we have not jurisdiction to try it."

In *Simpson* v. *Greeley*, this court said: " It is necessary
" in the first place, to examine the objection taken by the
" defendants, to the jurisdiction of this court, as that ob-
" jection presents a preliminary question, which, if decided
" in favor of defendants, will dispose of the case."

As appears from the foregoing opinions of this court, the application to dismiss this appeal is made in apt time. In the opinion last cited after the case was called for argument, the point was made preliminary to an argument upon the merits, and this court held the point made in apt time.

If S. ½ of Block 18 should have been ordered sold before the interest of appellant, Orvis, so the same Block should have been sold before the interests of Ricker and Flannagan, because the facts, if sufficient to entitle appellant to such order, are also sufficient to entitle Ricker and Flannigan to the same order.

But it will further appear, by reference to the decree, (Rec., p. 86), that " the South half (S. ½) of the North-
east one-quarter (N. E. ¼), of the South-west one-quarter (S. W. ¼) of Section five (5), township thirty-eight (38), North of Range, fourteen (14), East of 3d P. M., in Cook County, State of Illinois, is the property covered by the mortgage to said complainant, Nathan Powell, and liable for the payment of the amount now due on the note secured by said mortgage, to wit, the sum of $14,853.33.

" The court also finds that the premises covered by said
" mortgage as aforesaid, have been subdivided since the
" date of said mortgage, and that the property covered by
" said mortgage is now known as Blocks 13, 14, 15, 16, 17
" and 18, of Packer's Subdivision of the N. E. ¼," &c.

And in the ordering part of the decree, (Rec., p. 88), the

court directs that "in default of the payment of the said "sum so found to be due to the complainant, with interest "thereon from the said 17th day of March, A. D. 1875, "being the date of said Master's Report, that the said "mortgaged premises, or so much of the same as may be "necessary for the payment of the amount due on said "mortgage, with costs of suit, be sold at public auction," &c., and "it is further ordered, adjudged and decreed "that said Master first offer said premises separately, in "parcels, in the manner and order as herembefore pro-"vided, and if when offered in that way an amount sufficient "to pay what is due and owing to complainant, cannot be "realized, that then the said Master offer and sell said "premises as a whole, by the description thereof herein "first above named, and without reference to any sub-"division thereof whatever."

Hence, we see that not only are Ricker and Flannagan directly affected with appellant by this decree, because of their interests to have Block 18 sold before Blocks 14 and 16, but that all the co-defendants, of Orvis, Ricker and Flannagan, owners of the various blocks, are both directly and *indirectly* interested in the decree, because the decree rests as a lien upon all these blocks, and also because all these blocks may be sold in bulk to satisfy this decree, and hence they are all justly interested in this decree, as against the original complainant, Powell, and as against each other.

This court in *Simpson* v. *Greeley*, last cited., said:

"Cases arise beyond all doubt, where only one of sev-"eral defendants is affected by the judgment or decree— "and it is well settled that in such cases the party whose "interest only is affected by the alleged error, may carry "up the case without joining others in the appeal or writ "of error. But when the interest is joint, and when the "interest of all is affected by the judgment, the rule is "universal that all must join in the writ of error, or else it

"is open to the other party to demand that it be dismissed, "unless a severance of the parties in interest has been ef- "fected by summons and severance, or by some equivalent "action *appearing in the record.*

" * * * Viewed in the light of these suggestions, it is "quite clear that the writ of error in this case must be "dismissed; as all these defendants are directly or *indi-* "*rectly* affected by the judgment. * * Such a contro- "versy cannot properly be re-examined here by install- "ments, nor *unless all the parties to be affected by the re-* "*sult are before the court.*"

This decision is decisive of the case at bar.

It is indeed, quite clear that there could be no reversal of the decree as to appellant without affecting the interests of all the other defendants—and hence there could be no hearing of his appeal without having the other defendants before the court to assert their rights.

None of the parties are indeed before this court by any process, except the appellant *Orvis*, and the complainant below, *Powell*. None of the other defendants below are here. No process has been issued to them, and none of them have joined in this appeal. Only a portion of the defend- ants below have entered their appearance here. And even as to those who have entered their appearance here, they cannot make themselves parties to this record thereby, without proper pleadings, or process. No summons has been issued to them, and no severance claimed by the record—and no cause shown for such omission. Flanagan, Tillinghast, Coolbaugh, Powers, Ralston and Philpot, none of them have entered their appearance in this court, and hence cannot have their rights affected by this attempt to adjudicate anew upon them.

Harding v. *Handy*, 11 Wheat., 126.

II.

THE APPELLANT, ORVIS, DID NOT EXCEPT TO THE REPORT OF THE MASTER BELOW: AND WITHOUT AN EFFORT TO HAVE THE ERROR, IF ANY, CORRECTED BY THE COURT BELOW, THIS COURT WILL NOT LOOK INTO IT.

Brockett v. *Brockett*, 3 How., 691.

The only person who excepted to the Master's report, was Ricker, who has not appealed. The appellant, if he objected to the order in which the Master reported the property for sale, should have taken his exception according to the 83d rule in equity, which provides for the manner of bringing all objections before the court.

As was said by this Court in the case first cited: (This rule) "provides that 'the parties shall have one month "'from the time of filing the Master's report to file excep-"'tions thereto, and if no exceptions are within that period "'filed by either party, the report shall stand confirmed on "'the next rule day after the month is expired.' No ex-"ceptions having been filed in the Circuit Court to the re-"port of the Master, none can be heard in this Court."

III.

NO CROSS-BILL FILED BY APPELLANT.

It seems a great hardship to this appellee, to be delayed in the execution of his decree by one of the defendants, where there is no objection made to this appellee's mortgage, or the amount found due thereon.

It is wholly a contest between the defendants, in which the complainant has no interest.

But the defendant, Orvis, appellant here, did not file a

cross-bill against his co-defendants in order to litigate this question with them, and without such cross-bill he has no right to question the order in which the premises are decreed to be sold. If he had filed such cross-bill then he might have been in a position to raise the question—but this Court cannot tell as between the defendants, who is in the right, or who in the wrong.

It is affirmative relief that is claimed by one defendant against another defendant. And without a cross-bill he cannot raise the question.

Story Eq. Pl. § 392.

Iglehart v. *Crane*, 42 Ill., 271.

As was said in the latter case: "If complainants had "executed no releases, *and the appellants had sought merely* "*to procure a decree directing the lots last conveyed to be first* "*sold*, it would, doubtless, have been necessary to file a "cross-bill making their co-defendants parties, as they "would have been asking a decree to the prejudice of "their co-defendants."

While a nominal cross-bill was filed by Orvis, it only sought to bring Coolbaugh, Powers and Mrs. Tillinghast before the Court, and left out all the other defendants and owners of the other blocks, and no process was taken out against Mrs. Tillinghast, who had an interest in Block 18, to bring her into court, she never before having been made a party. Nor does that cross-bill set out a single fact upon which any relief could be founded. A conveyance had been made to Coolbaugh and Powers long before the conveyance to Orvis, and agreement between Coolbaugh and Powers to convey Block 18 to Mrs. Tillinghast does not give Orvis the right to have it sold before his block.

So that, in whatever light this case may be viewed, appellant has no standing in this Court to impeach that decree.

As to the actual question of the inverse order of aliena-

tion we leave the discussion of the same to Mr. Pence, counsel for Greenebaum and others.

IV.

SHERMAN A. RICKER CANNOT BE HEARD IN THIS COURT, WHATEVER ERROR MAY HAVE BEEN COMMITTED AS AGAINST HIM. HE DID NOT PRAY AN APPEAL, AND CANNOT BE HEARD TO URGE AN ERROR.

Tilden v. *Blair*, 21 Wall.

That case was a writ of error; but, in this respect, there is no difference between a writ of error and an appeal.

Simpson v. *Greeley*, 20 Wall., 152.

Revised Stat. U. S., § § 10. 2, 1013.

CHICAGO, April 11, 1878.

Respectfully submitted.

JOHN P. WILSON,

Counsel for Appellee, Powell.

Judge Strong.

In the Supreme Court of the United States.

October Term, 1878.

EMMERSON G. ORVIS, Appellant,
vs.
NATHAN POWELL, Appellee.
No. 35.

MOTION.

The appellant moves the court for an order recalling the mandate and allowing a reargument of the above entitled cause, and says:

That neither of his counsel whom he expected to argue his cause were present at the hearing in October last.

That arrangements had been made, as they supposed, with all the opposing counsel, by which, with the consent of the court, the hearing would be postponed till December. He is now informed that the postponement was resisted by one who wished in this cause to reargue a question of law, argued by him at the last term in another cause, and decided against him.

Appellant further says that he is informed that two important questions raised by his assignment of errors are not alluded to in the opinion of the court, and as little was said in reference to them in the argument made, he concludes that they did not receive the careful consideration of the court.

The first is raised by the third error assigned, as follows:

"In decreeing a sale of the land and the buildings thereon, described in said Powell's mortgage, instead of decreeing a sale of one-fourth undivided interest in said lands, the only interest that passed to said Powell by said mortgage."

The parties to the suit having furnished the evidence of their title to the lots in question, must be bound by that evidence. (See Record, p. 94.) According to this evidence, H. H. Walker, the mortgagor, had but an undivided fourth interest in the lots he mortgaged to Powell. This matter is discussed in appellant's brief as follows:

"The abstract of title shows that H. H. Walker's estate in the lands he mortgaged to Powell was limited to the undivided fourth interest in the same.

"Powell sold to him an undivided fourth interest in the S. W. $\frac{1}{4}$ of section five, for what consideration does not appear, and afterwards took this mortgage on the N. E. $\frac{1}{4}$ of said quarter section. This being a suit between the original parties, and the real facts as to the title appearing in the case, the court was bound to take notice of the extent of Walker's interest conveyed actually by the mortgage, and conform its decree to those facts. It was, therefore, error to decree a sale of more than a one-fourth undivided interest in any of said blocks."

The second is raised by the fifth error assigned:

"If the court shall be of the opinion that the rule, based on the inverse order of the alienation of the premises by the mortgagor or his alienees, is a part of the *lex loci*, then the court below erred in the application of the rule to the facts in this case, as established by the pleadings and the evidence."

And the attention of the court is specially called to the following extract from his supplemental brief, p. 3:

"But assuming that the inverse order is a part of the *lex loci*, and also assuming that Orvis derived his title from H. H. Walker, whose deed he took on the 26th day of February, 1874, instead of deriving it from Kenney, in whom the title was vested on the said 26th day of February, 1874, still the appellees are in error in supposing that the Orvis lot is to take its place in the order of sale under the Powell mortgage where it would, if S. J. Walker had continued to own it up to February 26, 1874, and had then sold it to Orvis.

"This results from the fact that H. H. Walker, the mortgagor, sold the mortgaged premises to S. J. Walker in 1870, not with warranty but by quit-claim deed, and subject to the Powell mortgage, the payment of which was assumed by S. J. Walker, as shown both by his evidence (R., p. 70) and by the Powell mortgage, which shows that S. J. Walker signed the note secured by the mortgage; and this being recorded, was notice to all parties.

"This being so, the re-purchase of block 16 by H. H. Walker does not in any manner change the order in which said block would otherwise be subject to the Powell mortgage.

"This follows, as a necessary consequence, from the rule of law that would place block 16, last on the list, subject to sale under the Powell mortgage, in case its ownership had remained in H. H. Walker, after selling the balance of the mortgaged premises to S. J. Walker on the same terms and conditions of the sale made to him in 1870.

"The decisions of the courts upon this point are numerous, and all to the same effect. Among them are the following: Chapman *vs.* Beardsley, 3 Connecticut, 115; Engle *vs.* Haines, 1 Halsted Chancery, 192; Ferris *vs.* Crawford, 2 Denio, p. 595; and Mason *vs.* Payne, 1 Walker's Chancery, 459.

"In the case of Chapman *vs.* Beardsley, it appears that Beardsley, owning three tracts, mortgaged them to a savings bank, and then conveyed two of the tracts to Barker, Barker agreeing to assume and pay the mortgage debt. Afterwards, Barker conveyed the two tracts he had thus purchased to Page, and Page to Chapman, all having full

knowledge of the facts and agreement between Beardsley and Barker. Chapman paid the mortgaged debt, and then sought to collect the note out of Beardsley, foreclosing the mortgage of the tract retained by him. The court held that Beardsley's vendees became the principal debtors to the bank, leaving Beardsley a surety simply, and as a surety he could at any time have paid the bank and foreclosed the two tracts held by his own vendees.

"In the case of Engle *vs.* Haines, Chancellor Halsted, in delivering the opinion of the court, said:

'If a mortgagor subsequently to the mortgage sells and conveys a part of the mortgaged premises, an equity arises in favor of the purchaser, to have the part of the mortgaged premises which remain in the mortgagor first sold for or towards the payment of the mortgage, but if such subsequent purchaser agrees with the mortgagor that the part he buys shall be subject to the mortgage, and that the amount due on the mortgage shall be a part of the consideration for the portion he buys, equity will not interpose to protect him by subjecting the part of the mortgaged premises remaining in the mortgagor to be first sold. A subsequent purchaser of such portion from the grantee of the mortgagor with notice of the facts has no better equity against the mortgagor than the first purchaser.'

"In the case of Caruthers *vs.* Hall, a bill was filed to foreclose a mortgage made by Johnson. Hall, a subsequent purchaser, answered, showing that the mortgagor had conveyed a part of the mortgaged premises to Redson, subject to the entire mortgage which the deed declared she was to pay, and that his own purchase was made subsequently. The court held that the portion as to Redson should be first offered, and that Hall's portion should only be resorted to in case of deficiency, and that it was not necessary for Hall to file a cross-bill.

"Our claim is that Orvis does not derive his title from H. H. Walker, but derives it from Kinney, who owned the lot when H. H. Walker deeded it to Orvis, and who subsequently deeded it to H. H. Walker, by which deed it vested at once in Kinney. But if in this we are mistaken, then we claim the rule of law to be as above set forth, that even

had Kinney conveyed to H. H. Walker the Orvis lot before H. H. Walker gave a deed of it to Orvis, still the lot would be subject to sale under the Powell mortgage in the same order and under the same conditions it would have been had Kinney sold and deeded it direct to Orvis. In other words, Orvis stands in Kinney's shoes, whether he derives his title from Kinney or from H. H. Walker."

Appellant further says that an order was passed to issue the mandate on a motion of which his counsel had no notice. The facts are as follows: It was issued on the —— day of January, 1879, on the appellee's motion made on the 21st day of January, 1879, service of which motion was acknowledged on the 13th day of January by Mr. W. Fuller, who was counsel for Sherman A. Ricker, one of the appellees, and the one most directly opposed to the appellant, as his property, block 14, is by the decree held liable to sale next after that of the appellant.

Mr. Fuller's name appears of record in this court for the appellant; but the printed record and the brief filed by him show that he was Ricker's counsel from first to last.

Letters on file in the clerk's office, with the papers in this cause, show that it could not be docketed by Mr. Alexander, the appellant's local counsel, he not being a member of the bar of this court. Said letters also show that it was docketed in the name of Mr. Fuller for Mr. Alexander, he, Fuller, then being a member of the bar of this court. It also appears from a letter of Mr. Fuller, on file, that he regarded General Butler and O. D. Barrett as *in fact* the only attorneys of record on behalf of the appellee.

No new rights can have been acquired under the mandate, as the one hundred days given by the decree for payment of the mortgage before a sale could be enforced have not elapsed since the mandate was sent to the court below.

BENJ. F. BUTLER,
Of Counsel for Appellant.

I, O. D. Barrett, make oath that I have read the petition above and know the contents thereof; that the matters and things therein set forth are true to the best of my knowledge and belief.

O. D. BARRETT.

Subscribed and sworn to before me this 10th day of March, 1879.

[SEAL.]

R. J. MEIGS, *Clerk*,
By W. A. CLANCY,
Asst. Clerk.

April 14 '79 Rec'd

Supreme Court of the United States.

October Term, 1878.

EMERSON G. ORVIS, Appellant,

vs.

NATHAN POWELL, Appellee.

No. 35.

And now comes the appellant, Orvis, here and suggests to the court a diminution of the record in this cause, and alleges that there is wanting in said record the following pieces of evidence and papers which belong to the records of the circuit court of the United States for the northern district of Illinois, from which this case is appealed, which pieces of evidence and papers are in the possession of the clerk of said circuit court.

And said appellant, Orvis, suggests and makes known to this honorable court that he is informed, and verily believes, that there has been an interpolation in the original decree passed in this cause of an order, as part of said decree, deeply affecting the appellant's rights and interests.

And said Orvis further shows to this honorable court that this interpolation was unknown to him until after the argument of said cause in this court, and after the application for a rehearing thereof, and was discovered and made known to him for the first time in the manner following: After said application for a rehearing, one of his counsel

went from Washington in behalf of himself and those interested with him in said cause, to make a full examination of the records to see if the whole record had been sent up. Upon examination of the records and papers in the cause in other matters, he had occasion to look at the original decree, and found that the same was not on file, but had been abstracted therefrom. That the counsel made application to the clerk to know where it was, and was informed that he did not know. This was on Friday, and upon Monday, upon again referring to the papers in the cause, the paper containing the decree was found in the file of papers belonging to the case where it was not on the Friday before; and upon inquiry no one in the clerk's office was able to give any information as to when the paper went away or how it came back. To prevent the further absence or spoliation of the paper, the counsel caused a photo-lithographic copy of the same to be taken, which is herewith produced and made a part of this application, and to which the court is referred, showing the interpolations on the margin of said decree, which appear twice; first, on the margin of page 5 of the decree, and afterwards on page 6, and also corresponding interlineations in the body of said decree to make it conform to said marginal interpolations. All of which interlineations and interpolations are not in the handwriting of the person who prepared the original draft of the decree. That said original draft of the decree was in part prepared in consultation with opposing counsel, and when it left the hands of opposing counsel these interlineations were not there, nor were they ever known to the opposing counsel until —— years afterwards; that the decree was presented to the court with the endorsement on page 9, "The above is satisfactory to me.—A. M. PENCE," without the certificate that it was satisfactory to any other of the counsel in the

case. Mr. Pence being the attorney and counsel of the party in whose favor solely the interlineations were made.

And the appellant further suggests and gives information to the court that in the abstract of title filed in said cause it appears that the deed from H. H. Walker, the mortgagor, to Samuel J. Walker, which was in the form of a quit claim, was for the nominal consideration of one dollar only, which would give notice to all the subsequent purchasers of said mortgaged premises that he had conveyed the same subject to the mortgage, so that they must have bought with record knowledge of that fact.

And the appellant begs leave to annex the affidavit of Joseph E. Smith, Esq., of counsel for Ricker, one of the defendants in said cause, with the exhibits thereto attached, and the affidavit of O. D. Barrett, Esq., as evidence of the facts hereinbefore set forth.

Wherefore the appellant prays the court that a writ of *certiorari* in due form shall be ordered, commanding the judge and clerk of said court to send up the original decree of the court ordered to be entered by the court, in order that the interlineations and interpolations may appear to this court; and also a certified copy of so much of the abstract of the title as relates to the conveyance by Henry H. Walker of the mortgaged premises to Samuel J. Walker by his deed of April 12, and recorded the 19th day of September, 1870.

BENJ. F. BUTLER,
Of Counsel for Appellant.

Affidavit of O. D. Barrett.

O. D. Barrett, of the city of Washington, counsellor-at-law, on oath deposes and says that I am of counsel for the appellant in the above-entitled cause; that I argued the same before this court upon the original hearing in the absence of the senior counsel, Mr. Butler; that after the motion for a rehearing was prepared and filed in the cause in behalf of my clients I went to Chicago to examine the record in said cause in the circuit court of the United States for the northern district of Illinois, among other things to see whether there was any diminution of the record sent up to this court which might affect the points taken as matters of error in the rehearing. Upon an examination of the files of the original papers I found the abstract of title to the mortgaged land in question, which showed two facts which I believe material to be known here in the decision of the cause, and which do not appear in the record:

First. That the whole title to the mortgaged property in question was in H. H. Walker, the mortgagor, at the time of the mortgage to said Powell, while in the record of this court it appears that only a title to one undivided quarter part thereof was in said mortgagor; and upon this want of title the appellant had charged error in the decree of the court below at the original hearing and also in the rehearing asked for. I also found that the record shows that the mortgagor, H. H. Walker, had conveyed, for the nominal consideration of one dollar only, the mortgaged property, subject to the mortgage, by his quit-claim deed of April 12, 1870, recorded September 19th, 1870, to S. J. Walker, so that all the claimants by derivative titles through S. J. Walker had record notice that they purchased title through him subject to the mortgage, which fact does not appear in the record here.

I also had occasion to examine the original decree entered by the order of Mr. Justice Blodgett, of the district court for the northern district of Illinois, holding circuit court in said district when said decree was entered. I was unable to find said original decree among the papers on the files of the court, and could learn nothing of its

whereabouts or existence from the clerk of the circuit court, upon careful inquiry made of him in that behalf.

And I further depose and say that I found the paper containing the original decree missing upon my search on Friday, and I am certain that it was not on the file of the court in the cause, nor could I learn anything of it. On the following Monday, I made a further examination of the papers upon other points, and I found among them the original decree, a photographic copy of which is annexed to the motion for a writ of *certiorari* in this case. I then made inquiry where the paper had been found, and when it had been returned to the files in the clerk's office, but could learn nothing as to when or how it had come again upon the files.

I was assisted in my examination, on both days, by J. Rollin M. Squire, Esq., attorney and counsellor-at-law, of Boston, Massachusetts, who went with me to Chicago to assist in an investigation into the matters concerning this suit in Chicago. Both Mr. Squire and myself were very much surprised to find the paper containing the decree, which we felt sure was not among the papers on Friday. Previous to Monday, however, we had been informed by Hon. M. W. Fuller, of counsel for one of the parties in the case, that he had made very dilligent search for said paper containing the decree long previously, and had been unable to find it. Finding interpolations upon the margin of the paper very important to the interests of my client, and interlineations in the body of the decree, in order to prevent further possible spoliation or interlineation of the paper I asked the clerk of the court to allow me to have a photo-lithographic copy made thereof, by sending the original paper containing the decree, in charge of one of his assistants, to a photographer to have a copy taken, which he consented to do, and the assistant going with me, carried the paper to a photographer, where a copy was made, and the original copy was taken back by the assistant to the clerk's office.

Upon receiving the photographic copy I repaired to the clerk's office, and, with the clerk, I compared diligently and carefully the photographic copy with the original, and found them to conform, and that the one was an exact

copy of the other. In this both the clerk and myself agreed. I then asked the clerk to certify and attest to the truth of this copy in due form, under the seal of the court, that the same might be used in evidence. This he declined to do until after he could get the instruction of the justice of that court; and he afterwards informed me that he had been instructed by the judge not to certify and attest said copy. This copy is annexed to the affidavit of Joseph E. Smith, Esq., of Chicago, which is annexed to and made a part of the petition for *certiorari* filed in this case.

Deeming it important that the court here should see the original paper and judge of the differences of handwriting of the interlineations, as part of the evidence in this hearing, I filed a motion, under the eighth rule of the Supreme Court, that the presiding judge should pass an order directing the clerk to send up the paper to this honorable court. That motion, after notification to the opposing counsel, was duly heard before the court, being argued by myself on the one side, and by Mr. Pence, the counsel for the party in whose interest said interpolations had been made, on the other.

I had informed Mr. Pence and the court that a rehearing had been ordered in this cause by this court, and that parties had been directed to file their briefs on or before the 15th day of April. The presiding judge informed me that he would have a conference either in person or by correspondence with Judge Blodgett, who entered the original decree before he made a decision in the matter. I waited some four days for that decision, when it became necessary that I should return to Washington. The motion was not decided when I left. Some ten days afterwards, and within a week of the date hereof, while in preparation for the hearing on this motion, I telegraphed to the clerk of said circuit court to know if said motion had been decided, and learned by telegraph from him that it had not been.

And I further depose and say that the photographic copy annexed to the motion, and the photo-lithographic copies annexed to the printed copies of this motion, and the affidavits in support thereof, are true and exact copies of the paper containing said original decree, and further deponent saith not.

O. D. BARRETT.

Subscribed and sworn to before me this 14th day of April, 1879.

[SEAL.] JOHN T. C. CLARK, *Notary Public.*

STATE OF ILLINOIS, } ss:
County of Cook, }

Joseph E. Smith, of lawful age, on oath says that the paper or document of which the annexed is a photographic copy was prepared by Junius Mulvey, complainant's solicitor and this affiant, in accordance, as he verily believes, with the report of the Master in Chancery, as confirmed by the court. That when so prepared the first and second pages were in the handwriting of said Mulvey; that the third, fourth, fifth, sixth, seventh, and eighth pages were in the handwriting of this affiant, and the ninth page was in print; that when the same was so prepared it was agreed upon by the said Mulvey and this affiant as and for the decree to be entered in the suit, to wit: Nathan Powell, complainant, *versus* Henry H. Walker and others; and this affiant had no knowledge, until recently, that the decree was not entered therein as thus prepared. Affiant says further that he now finds that after said draft was so prepared and agreed upon it has been interlined on the margin of page four, also on the margin of page six; that the words "fourth," "fifth," and "sixth" have been changed, respectively, to "fifth," "sixth," and "seventh;" that on page eight the words "fixed by and in the report of said Master" have been erased, and the words "herein as above provided" inserted in their place; and the word "herein" has been interlined between the word "thereof" and the phrase "first above named."

Affiant says further that he does not know when, where, or under what circumstances said interlineations, erasures, and insertions were made; and that each and every of them were made without notice to him, and without any knowledge, information, or intimation on his part. And further he saith not.

JOSEPH E. SMITH.

Subscribed and sworn to this 22d day of March, 1879, before me,

[L. S.] WILL H. MOORE, *Notary Public.*

For a printed copy of the decree as photo-lithographed, see Record, page 85.

Supreme Court of the United States.

October Term, 1878.

EMERSON G. ORVIS, Appellant,

vs.

NATHAN POWELL, Appellee.

No. 35.

Brief on behalf of appellant, Orvis, submitted under order of this Court allowing a reargument of this cause.

I.

Appellant respectfully calls the attention of the court to the third error assigned in his original brief, as follows:

"In decreeing a sale of the land and the buildings thereon described in said Powell's mortgage, instead of decreeing a sale of one-fourth undivided interest in said lands, the only interest that passed to said Powell by said mortgage."

The parties to the suit having furnished the evidence of their title to the lots in question, must be bound by that evidence. (See Record, p. 94.) According to this evidence, H. H. Walker, the mortgagor, had but an undivided fourth interest in the lots he mortgaged to Powell.

Powell sold to him an undivided fourth interest in the S. W. ¼ of section five, for what consideration does not

appear, and afterwards, but not, as it appears, for the security of the purchase money, took this mortgage on the N. E. ¼ of said quarter section. This being a suit between the original parties, and the real facts as to the title appearing in the case, the court was bound to take notice of the extent of Walker's interest conveyed actually by the mortgage, and conform its decree to those facts. It was, therefore, error to decree a sale of more than a one-fourth undivided interest in any of said blocks.

Note.—The point above made is based on the record as it appears in this court. Appellant admits that the record in the *court below* does not sustain the point, as explained in his motion for *certiorari*.

II.

The appellants claim the advantage of the fifth assignment of error in their original brief, in this: Admitting that the sale of the several blocks of land to satisfy the mortgage should be made in the inverse order of their alienation by the mortgagor, as the court below found it and as this court has confirmed it, but that the court below erred in the application to the facts as found in this case, showing the order of alienation. That order will be seen to be as follows:

All title to the mortgaged premises passed out of H. H. Walker, the mortgagor, to S. J. Walker by quit-claim deed dated April 12, 1870, and recorded September 19, 1870, for the nominal consideration of one dollar, S. J. Walker assuming the mortgage debt, and all right, title, and interest passed out of S. J. Walker by *warranty deeds*, as follows:

Block 13 to Philpot, deed dated Sept. 10,'70, rec'd Dec. 9,'70.
" 17 " Ralston " " Oct. 2,'71, " Sep. 4,'72.

Block 15 to Brennock, deed dat'd Mar. 8,'72, rec'd Oct. 10,'72.
" 16 " Kinney " " Nov. 25,'72, " Dec. 2,'72.
" 18 " Coolbaugh & Powers, deed dated July 1, 1872, recorded Dec. 7, 1872.
" 14 " Ricker, deed dated Feb. 5,'73, rec'd Apr. 5,'73.

From this tabulation it will be seen that when Ricker purchased block 14, in Feb., 1873, he had received notice that his said block was liable to be sold to satisfy the mortgage under the inverse rule, before either of remaining five blocks could be touched; a part of one of said blocks, to wit, block 16, is owned by the appellant, Orvis.

Can that order of liability be changed because of the conveyances of said blocks subsequently made?

A year later (see diagram of the conveyances) it appears that block 16, which had been sold to Kenney by deed of warranty, recorded December 2, 1872, without any record title appearing in H. H. Walker, the mortgagor, he, said H. H. Walker, conveyed the south 100 feet of block 16 by warranty, and dated February 26, 1874, and recorded April 9, 1874, to appellant, Orvis, who still holds the same.

This, standing alone, would give no title to Orvis; but it appears that on the 6th of March, 1874, H. H. Walker received a quit-claim deed of said block 16 from Kinney, which deed was recorded on the 16th of March, 1874. Kinney had acquired his title to block 16 by a warranty deed from S. J. Walker, the first alienee of H. H. Walker, the original mortgagor, dated November 25, 1872, and recorded December 2, 1872.

Although H. H. Walker had no title when he conveyed to Orvis, yet, having received a title subsequently, by force of his covenants of warranty, that title enured to Orvis, and was good against all the world, except the Powell mortgage.

It may be claimed that the title received by Orvis

through H. H. Walker was defective. That title stands thus: S. J. Walker, the first alienee from the mortgagor, conveyed block 16 to Kinney by warranty deed, dated Nov. 25th, 1872, but said S. J. Walker had made a previous conveyance of said block 16 to Coolbaugh and Powers, by warranty deed dated July 2, 1872; but Coolbaugh and Powers failed to record their deed until Dec. 7, 1872, five days after Kinney had recorded his deed, to wit, Dec. 2, 1872. So that whatever title there was in S. J. Walker vested in Kinney, and was by him conveyed to H. H. Walker, and by H. H. Walker to Orvis, so that the purposes of the application of the rule as to the inverse order of sale, the title stands thus: H. H. Walker mortgaged the land back to Powell; then conveyed his equity of redemption to S. J. Walker by quit-claim deed, S. J. Walker assuming the mortgage debt. S. J. Walker had previously sold three other blocks, and subsequently sold blocks 18 and 14. It is clear that applying the inverse order rule of sale, blocks 18 and 14 would be liable to sale before block 16 upon this state of the title.

Is this order of sale affected by the fact that, subsequently to all these sales, to wit, on March 6, 1874, H. H. Walker received a title to block 16 from Kinney, who, as above set forth, had purchased with warranty from S. J. Walker?

When H. H. Walker sold the equity of redemption to the whole premises to a party who assumed the mortgage-debt, the mortgagee, Powell, had two remedies: one on the note, the other was on the land. He chose the latter in the present suit, and we are following the order of liability of the land to sale in the hands of third persons.

How is this order of liability affected, because the title to one of the blocks passed through H. H. Walker by derivation through a third person, subsequent to his sale of the equity of redemption?

When a mortgagee resorts to the land to satisfy his mortgage, his mortgagor, who has conveyed the equity of redemption in the land by a simple quit-claim deed, has no interest in the proceeding or claim to the land, except to see to it that the land shall so be administered by the court as to satisfy the lien upon it. But our position is stronger than that. H. H. Walker quit-claimed his equity of redemption for the nominal consideration of one dollar, and S. J. Walker assumed and agreed to pay the mortgage debt, as appears from his evidence, (Record, p. 70,) and besides, it appears that the property thus conveyed to him was worth many times the amount of the mortgage debt.

The rule of equity is, that he who takes a piece of property subject to a mortgage or judgment holds it as primarily liable to the lien of such mortgage or judgment. Upon this point there is no conflict whatever of authority.

Washburn on Real Property, (vol. 1, p. 571,) says:

"Where a purchaser from a mortgagor of the mortgaged estate agrees with his grantor to assume and pay the mortgage debt, * * as between the vendor and purchaser, in such a case the purchaser becomes the principal and the vendor the surety in respect to the debt."

In the case of Chapman *vs.* Beardsley, (3 Conn., 115,) it appears that Beardsley, owning three tracts, mortgaged them to a savings-bank, and then conveyed two of the tracts to Barker, Barker agreeing to assume and pay the mortgage debt. Afterwards, Barker conveyed the two tracts he had thus purchased to Page, and Page to Chapman, all having full knowledge of the facts and agreement between Beardsley and Barker. Chapman paid the mortgaged debt, and then sought to collect the note out of Beardsley, foreclosing the mortgage of the tract retained by him. The court held that Beardsley's vendees became

the principal debtors to the bank, leaving Beardsley a surety simply, and as a surety he could at any time have paid the bank and foreclosed the two tracts held by his own vendees.

In the case of Engle *vs.* Haines, (1 Halst. Ch. R., 192,) Chancellor Halsted, in delivering the opinion of the court, said:

"If a mortgagor subsequently to the mortgage sells and conveys a part of the mortgaged premises, an equity arises in favor of the purchaser, to have the part of the mortgaged premises which remain in the mortgagor first sold for or towards the payment of the mortgage, but if such subsequent purchaser agrees with the mortgagor that the part he buys shall be subject to the mortgage, and that the amount due on the mortgage shall be a part of the consideration for the portion he buys, equity will not interpose to protect him by subjecting the part of the mortgaged premises remaining in the mortgagor to be first sold. A subsequent purchaser of such portion from the grantee of the mortgagor with notice of the facts has no better equity against the mortgagor than the first purchaser."

In the case of Caruthers *vs.* Hall, (10 Mich., 401,) a bill was filed to foreclose a mortgage made by Johnson. Hall, a subsequent purchaser, answered, showing that the mortgagor had conveyed a part of the mortgaged premises to Redson, subject to the entire mortgage which the deed declared she was to pay, and that his own purchase was made subsequently. The court held that the portion as to Redson should be first offered, and that Hall's portion should only be resorted to in case of deficiency, and that it was not necessary for Hall to file a cross-bill.

In the case of Welch *vs.* Beers, (8 Allen, 151,) Mr. Justice Hoar, in delivering the opinion of the court, said: "In the case at bar, the exemption of the plaintiff's part of the land from contribution does not arise from a deed of warranty to him, leaving the whole burden to rest on the

other part, but from an express annexation of the whole to the other part by contract before the plaintiff purchased. Mrs. Prescott took a mortgage of the equity of redemption of the part to which the payment of the whole original mortgage belonged, with full notice of the arrangement; and the reason on which the decision in Bradley *vs.* George is founded would therefore seem to be fully applicable. The deed of warranty of a part does not of itself directly create a lien on the remainder for the amount of the mortgage; but equity recognizes the contract of the mortgagor as binding upon any subsequent purchaser who acquires a title with knowledge of his grantor's agreement.

See also Ferris *vs.* Crawford, 2 Denio, 525.

Mason *vs.* Payne, 1 Walk., 459.

In the most of these cases above quoted, the purchasers took the land with an express contract to pay the mortgage debt. In the case at bar, the evidence shows that there was an express contract between S. J. Walker and the mortgagor that he should pay the mortgage debt, and the form of the deed he received, a quit-claim, the nominal consideration, one dollar, and the great value of the property conveyed compared with the amount of the mortgage debt on the same, could leave no doubt on the mind of any one examining the property and the title, as shown by the records, that the first purchaser from the mortgagor had assumed the payment of the mortgage debt; and we find the authorities all agree that where a person buys simply the equity of redemption without any express contract to assume or pay the mortgage debt, that the land remains the primary fund for the payment of that debt, and that the mortgagor, if compelled to pay it, will be subrogated to the rights of the mortgagee.

In the case of Jumel *vs.* Jumel, (7 Paige, 591,) land was

conveyed "subject only to the mortgage thereinafter particularly mentioned." The court held that this language showed it to be the intention of the parties that the grantee was to take the premises subject to the payment of the mortgage; and added, "the grantee having accepted the conveyance subject to that implied condition, she was bound, as between her and S. Jumel, the mortgagor, to pay off and discharge the mortgage, so as to relieve him from personal liability to Berger on the bond. Although this could not deprive Berger of the right to resort to the personal liability of the mortgagor, or to the mortgaged premises, at his election, to obtain satisfaction of his debt, yet if the grantee of the land permitted the debt to be collected of the grantor, upon his bond, instead of paying it herself, as she was bound to do in equity, according to the implied condition in her deed, he had an equitable claim to be subrogated to the rights of the mortgagee, to enable him to reimburse himself by a resort to the mortgaged premises for that purpose."

In the case of Hyer *vs.* Pruyn, (7 Paige, 465,) we find a similar announcement of the law. It is condensed in the syllabus as follows: "By a sale of the equity of redemption upon execution, the mortgaged premises become in equity the primary fund for the payment of the mortgage debt, and the personal liability of the mortgagor to pay the debt becomes separated from the ownership of the land, and from the remedy upon the mortgage against the land."

To the same effect are the following cases:

Stebbinus *vs.* Hall, 29 Barb., 524.
Tice *vs.* Anin, 2 Johns. Ch. 125.
Russell *vs.* Allen, 10 Paige, 249.
Morton *vs.* White, 2 Carter, 663.
Weaver *vs.* Toogood, 1 Barb., 238.

Cox *vs.* Wheeler, 7 Paige, 248.
McKinstry *vs.* Curtis, 10 Paige, 503.
Matthews *vs.* Aiken, 1 Comst., 595.
Roll *vs.* Smalley, 2 Halst., 461.

The evidence establishing the fact (R., p. 70) that S. J. Walker in his purchase from H. H. Walker assumed and undertook to pay off the mortgage debt, and the law in such cases making H. H. Walker, the mortgagor, a simple surety for that debt as to S. J. Walker and his vendees, it must follow that it was competent for H. H. Walker to have purchased back from S. J. Walker any part of the mortgaged premises by warranty-deed, and to have held the part so repurchased and conveyed with the same rights as any stranger to the mortgage as to S. J. Walker and his vendees. Under such circumstances, certainly S. J. Walker could not come into court and ask to have a lot thus sold by him to his brother subjected to the Powell mortgage to the relief of any of said land he might hold; and if S. J. Walker could not, then none of his vendees could. But, if H. H. Walker could thus hold a lot conveyed to him directly from S. J. Walker, he could also thus hold block sixteen, conveyed to him by Kinney, a vendee, with warranty of S. J. Walker.

We have thus far proceeded in the argument as if the whole of block 16 was held by one title; but if the court shall differ from us, and shall conclude that any part of block 16 should be sold before block 14 or 18, either of which might satisfy the mortgage, then we say that the north 201 feet of block 16, the title of which now stands in Flannagan, which might satisfy the mortgage, ought first to be sold under the rule. Indeed, the decree so determines upon the general question of title that we have no need to examine the general title to determine the general

question upon the order of sale of the several portions of this block in which the appellant, Orvis, is interested.

But by an interpolation in the decree, the circumstances of which appear more at large in the appellant's motion for a *certiorari* herewith filed, it is ordered by the court below that the north 201 feet of block 16 be first sold, "excepting therefrom all the estate, right, title, interest, claim, property, and demand of the said John G. Rogers and of the said Elias Greenbaum and Gerhard Foreman therein, under and by virtue of the certain deed of trust executed by John D. Kinney to said John G. Rogers, bearing date the twenty-fifth day of November, 1872, and filed for record in the register's office of Cook county, Illinois, on the twenty-third day of October, 1873, and recorded therein in book 11, page 453, and subject thereto."

Assuming that this portion of the decree had been part of the master's report, which it is not; had been confirmed as such, which it is not; had been a part of the decree passed by the judge, and signed by him, which it is not; and that it was a proper decree to have been made, in that it undertakes to deal with the equities of other parties, in postponing the sales of lots according to the inverse rule, to satisfy the Powell mortgage, because Powell having the underlying security has a right to have the lots sold in their order without regard to any of the equities arising out of subsequent conveyances, as between those holding derivative titles from his mortgagor, still we say that this part of the decree is error under the actual state of the title, which is as follows:

The whole of block 16 was sold by S. J. Walker, the alience of the mortgagor, H. H. Walker, by deed dated November 25, 1872, recorded December 2, 1872, to one John D. Kinney, for $20,000, $8,000 of which was paid to Walker, and a deed of trust in favor of Walker to secure

the balance of the purchase money was made to one John G. Rogers; Kinney, as we have seen, on the 6th of March, 1874, by a deed recorded the 16th of March, 1874, conveyed block 16 to H. H. Walker, subject to said $12,000 trust deed; and on February 27, 1874, H. H. Walker conveyed the north portion of said block 16 to William Flannagan, which deed was recorded the 15th of April, 1874. Afterwards, Orvis, by securing in another form the trustee under the trust deed, Rogers, for one-third of the amount thereof, to wit, $4,000, obtained a release of the south one hundred feet from said trust deed, by a deed from Rogers dated April 8th, 1874, and recorded April 16th, 1874, leaving the whole debt due under the trust deed a lien only upon the north portion of block 16, held by Flannagan. Thus it appears on the record that the south portion of block 16 was wholly released and free from the deed by Kinney to Rogers.

Now, by the interpolation in the decree, the whole of said block 16 is to be sold, subject to the Kinney trust deed, thus throwing the whole burden, it may be, of that trust deed upon the south half, from which it had been expressly released. This must be so, because the amount which the northern portion of block 16 will sell for, being sold subject to the trust deed, will be less by the amount of the trust deed. Nor is this aided by the provision in the deed, that after the sale of the south portion of block 16 and block 14 the trust deed interest of Rogers in the northern portion is to be sold, because it by no means is certain that the mortgage interest will sell for its full amount or even its full value, whereas the full amount is to be deducted. Therefore it is claimed that upon this point only this decree must be set aside and sent back to be reformed in the lower court, where, upon a final hearing, the whole equities may be made to appear; because,

while it is not necessary for this discussion, it appears from the record that no title passed to Flannagan at all by the deeds to him, which were held in *escrow* until the Kinney mortgage was paid; and there is an attempt to substitute the personal liability of Flannagan to pay money into court in the decree under an order for an encumbrance upon an estate. This need not be further examined here, and it is only called to the attention of the court to show that the decree must be sent back to be reformed in the court below.

Let us now examine this part of the decree upon other grounds, assuming that it had been made. The primary error would seem to be in this; that it attempts to deduct from the property subject to the mortgage in the order of sales certain amounts supposed to be due to other parties holding derivative titles, while the proper course would have been to have ordered the sales of the property to have been made to satisfy the mortgage, and, if necessary to adjust the equities between other parties, to have ordered the surplus money derived from sales necessary to be made to adjust those equities to be brought into court, and there subject to such action as the court should be advised.

Secondly. There is error in this; that while the master's report makes the northern portion of block 16 subject to sale by the inverse rule prior to the sale of the southern portion, yet the master has made no report upon the equities of Greenbaum and Foreman, or Rogers, or any finding as to the amount due upon the Rogers trust deed, or anything concerning it, and the record shows no exception to the master's report on this account, or in this regard, or any bearing upon any such question by the court, save a single exception, which is sustained, but which has nothing to do with this part of the report. And then it is believed it is the course of a court in equity to conform the decree

strictly to the accepted and adopted portions of the master's report, which is not done in this instance. We respectfully refer the court to the discussions had upon our application for a writ of *certiorari*, if it should be necessary, as to whether this should be considered a portion of a decree in equity in this case. We remark further, only, that a decision in favor of the appellant upon any one of the aforesaid points, would obviate the necessity for a decision on the motion for a writ of *certiorari*.

BENJ. F. BUTLER,
O. D. BARRETT,
Counsel for Appellant.

Supreme Court of the United States.

October Term, A. D. 1878.

EMERSON G. ORVIS,
Appellant,
v.
NATHAN POWELL.

ARGUMENT ON BEHALF OF SHERMAN A. RICKER, UPON RE-HEARING.

MELVILLE W. FULLER,
Of Counsel for Sherman A. Ricker.

CHICAGO.
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1879.

SUPREME COURT OF THE UNITED STATES.

EMERSON G. ORVIS, *Appellant,*
vs
NATHAN POWELL.

ARGUMENT ON BEHALF OF SHERMAN A. RICKER, UPON RE-HEARING.

MAY IT PLEASE THE COURT:

Service of notice of the application for the issuance of the mandate in this case, was made upon me as the solicitor of Mr. Ricker, as I supposed.

It did not occur to me that Mr. Powell's solicitors would neglect to serve those of the appellant, Orvis. Any misunderstanding that may have arisen was entirely accidental, and this the counsel of Mr. Orvis well knew, and should have stated in their motion for rehearing, which is erroneously couched in language susceptible of a different construction.

I.

The decree is correct and should be affirmed, as between Orvis and Ricker.

The Master's report as confirmed directs the sale of, 1st, The north 201 feet of block 16; 2nd, The south 100 feet of block 16; 3d, block 14.

The decree (printed Record, p. 87) orders the sale of 1st, The north 201 feet of block 16, excepting the interest under the Rogers trust deed; 2nd, The 100 feet of block 16; 3d, Block 14; 4th, The interest under the Rogers trust deed.

Mr. Ricker is the owner of block 14, and Mr. Orvis of the south 100 feet of block 16.

Ricker acquired title to block 14 by deed dated Feb. 25th, 1873, recorded April 5th, 1873.

Orvis acquired title by deed dated Feb. 26th, 1874, and recorded April 9th, 1874.

The Abstract shows the following:

Powell to H. H. Walker, deed dated April 1st, 1869; recorded May 25th, 1869.

This conveys an undivided quarter of the quarter section.

H. H. Walker to Powell. *The mortgage in question*, dated April 8, 1869, and recorded May 25, 1869, to secure note of Samuel J. & H. H. Walker (P. Rec. pp. 93 and 94).

This conveys the N. E. $\frac{1}{4}$ of the quarter section.

H. H. Walker to Samuel J. Walker. Quit-claim, dated April 12, 1870, and recorded Sept. 19, 1870.

Powell to H. H. Walker. Release of the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, etc., dated Sept. 12, 1870, and recorded Sept. 19, 1870.

Subdivision by Sam'l J. Walker, Sept. 30, 1870.

Pursuing blocks 14 and 16 of this subdivision, we find *warranty deed, Sam'l J. Walker to Coolbaugh & Powers*, of blocks 14 and 16 (*inter alia*), dated July 1, 1872, and recorded Dec. 7, 1872.

Block 14.

Quit claim of *Coolbaugh & Powers to Sam'l J. Walker* of block 14, dated Feb. 25, 1873, and recorded April 3, 1873.

Warranty deed of *Sam'l J. Walker* to *Sherman A. Ricker*, dated Feb. 25, 1873, and recorded April 5, 1873, of block 14.

Block 16.

Warranty deed of *Samuel J. Walker to John D. Kinney*, dated Nov. 25, 1872, recorded Dec. 2, 1872.

Quit claim of *John D. Kinney to Henry H. Walker*, Mar. 6, 1874, recorded Mar. 16, 1874.

Quit-claim of *Coolbaugh & Powers* to *Samuel J. Walker*, of said block 16, dated Feb. 25th, 1874, and recorded April 15, 1874.

Quit-claim of *Samuel J.* to *Henry H. Walker*, dated April 11, 1874, and recorded April 15, 1874.

Receipt by *Samuel J. Walker* to *Wm. Flanagan*, of payment on account of purchase of north 200 feet of block 16, dated Feb. 27th, 1874, and recorded April 4, 1874. (P. Rec. p. 95.)

Warranty deed of Henry H. Walker to Flanagan of said north 200 feet, dated Feb. 27, 1874, and recorded April 15, 1874.

Contract of Samuel J. & Henry H. Walker with Emerson G. Orvis, dated Feb. 26, 1874, and recorded same day, for conveyance of south 100 feet of block 16. (P. Rec. p. 95).

Warranty deed *Henry H. Walker* to *Orvis*, dated Feb. 26, 1874, and recorded April 9, 1874.

It is now argued by Mr. Orvis' counsel that block 14

ought to have been decreed to be sold before the south 100 feet of block 16, because it is said that the passage of the title through Kinney to H. H. Walker placed the latter in the attitude of a stranger, and he thereby ceased to occupy his original position of mortgagor to Powell, or in other words, that Orvis can stand in Kinney's shoes.

And it is also contended that H. H. Walker *originally* conveyed to S. J. Walker, who assumed to pay the Powell mortgage, and that the reconveyance of block 16 to H. H. Walker put the latter in the same position as if he had originally sold all of the blocks except 16 to S. J. Walker, upon an express agreement by the latter to pay the Powell mortgage, and cases are cited to the effect that the rule of selling first, what remains in the mortgagor does not apply where he has sold part upon an express agreement that the purchaser shall pay the mortgage.

The rule under consideration grows out of the relation between the vendor and vendee. It is because the vendee may throw the burden of the paramount incumbrance on the vendor, that a subsequent purchaser is also bound.

The application of the rule therefore, depends on the contract of sale. There is a manifest difference where a vendee of *part* of the land covered by a mortgage, agrees in terms, or by a necessary implication, to be answerable for the whole of the mortgage debt, *in consideration of a corresponding deduction from the purchase money.* Under these circumstances the equity is reversed, and the vendor, and those claiming under him, will be *subrogated* to the mortgage against the vendee, and any one to whom he subsequently conveys.

> *Aldrich* v. *Cooper*, Leading Cases in Equity (White & Tudor,) Vol. II., part I., p. 303, (4th Amer. Edition.)

But there is nothing in the facts of the case at bar which renders resort to this principle appropriate or applicable.

It is true that the *bona fide* purchase of an estate for valuable consideration purges away the equity from the estate in the hands of all persons who may claim title under it, but this is subject *to the exception* of the *original* party. If the estate becomes re-vested in him the original equity will attach to it, in his hands.

1 Story's Eq. Jur. § 410.

Kennedy v. *Daly*, 1 Sch. & Lef. 379.

H. H. Walker conveyed the whole forty acres to S. J. Walker by quit-claim. There is no proof of the contents of this conveyance, and no color for insisting that S. J. thereby covenanted to pay the Powell mortgage. Upon the face of the record, S. J. took but the equity of redemption, and the purchasers from him *in parcels* took but the equity, and should therefore be held as all alike liable to the mortgage debt, and *not* in the inverse order of alienation.

But the evidence fully establishes that H. H. Walker was a mere dummy, and S. J. Walker was the real purchaser from Powell and the real mortgagor *to* Powell, and S. J. Walker was in every instance the real vendor of the blocks and parts of blocks, and *so known to the purchasers*.

S. J. Walker testifies (Printed Record, p. 69):

"Q. Of whom did you purchase the property that you afterwards called Packer's subdivision, prior to your subdivision?

A. *Of Powell.*

Q. Didn't you purchase from Henry H. Walker?

A. I think I did purchase *through* Henry H. Walker the forty acres; yes sir, that was the case.

Q. When Henry H. Walker conveyed the premises to you by a quit-claim deed, did you assume the payment of the Powell mortgage?

A. It was understood that I was to pay the Powell mortgage. *The property really was mine that was purchased of Powell at the time*, although it was taken from Henry H. Walker at the time."

The mortgage note was executed by Samuel J. as well as H. H. (Printed Rec. p. 93), and he was of course bound for its payment, but not by reason of anything in the quit-claim deed.

The Circuit Court rightly treated H. H. Walker and S. J. Walker as identical, and so notorious is the fact of that identity, that rigorous proof is not required in the community where they live. If this decree is to be reversed, it is hoped that the door will not be closed to the introduction of further evidence, if necessary, on this branch of the case.

The rule of the inverse order is not an arbitrary one. It is equitable purely, and will not be applied in any case where it will work injustice.

Hill v. *McCarter*, 27 N. J. Eq. 41.

If these two men were identical, or if S. J. Walker was *the* man, and the other merely his conduit, then it is imposible to argue that H. H. Walker could deal with the title as a stranger.

The conveyance by Kinney to him was a conveyance to the *original* mortgagor, and the estate becoming revested in him, the right to insist that the mortgagor's interest should first be sold, immediately attached.

And the result is the same if we regard the conveyance though in form to H. H. as being in fact to S. J., which is the actual truth.

And with what propriety can this argument be pressed on behalf of *Orris*, whose contract of sale was with S. J. Walker as well as H. H. (see p. Rec. p. 95), and who knew that the Powell mortgage note was signed by both of them?

It will be noted also that the whole of block 16 was conveyed to Kinney, and by Kinney quit-claimed to H. H. Walker, in March, 1874, and on the 27th of February, 1874, the contract of sale of the north 200 feet was made by S. J. Walker to Flanagan, and the deed of

the same by H. H. Walker to Flanagan, bears the same date as the contract (see p. Rec. p. 95). The inference from these almost simultaneous contracts for the sale by S. J. Walker to Flanagan and Orvis, and deeds by Henry in pursuance thereof, is quite irresistible as to the real nature of the ownership.

This record is full of evidence; such, for instance, as that of Mr. Hervey, on page 78, of the printed record, that all of these purchasers bought of Samuel J. Walker, irrespective of the question whether the title was in him, or the conveyance to be made by him or not.

Again, the deed of block 16 to Coolbaugh and Powers bears date July 1st, 1872, although it was not recorded until Dec. 7th, 1872, while the deed to Kinney bears date *Nov. 25th*, 1872, but was recorded Dec, 5th, 1872.

The *date* of the conveyance is *prima facie* the time when the equitable right accrues: but even in the case of a contract, he who has purchased in good faith will be preferred to a subsequent purchaser, although the conveyance to the latter may be prior in point of time.

James v. *Hubbard*, 1 Paige, 234.

It is a question of fact at the time the sale is ordered, what the equities are as between claimants of different parcels.

Ricker got title in February, 1873, to block 14, and Orvis title to 100 feet of block 16 in March, 1874.

When Kinney quit-claimed to Walker in March, 1874, block 16, the latter held it subordinated to the deed to Coolbaugh & Powers *dated* July 1st, 1872, (months prior to the deed *to* Kinney), and it was therefore undoubtedly that Coolbaugh & Powers quit-claimed to Samuel J. in Feb., 1874, and Samuel J. to H. H. Walker in April, 1874, all of which was done in carrying out the agreement of sale by Samuel J. to Orvis. But Ricker's rights had enured to him a year before.

Indeed, Orvis sets up in his answer (p. Rec. p. 10), that he contracted Feb. 4, 1874, "with said Henry H. and *Samuel J.* Walker" for the purchase of the 100 feet, and that he was advised the mortgage was a valid and subsisting lien, but that the Walkers represented it had been wholly paid and would shortly be discharged, and that he, Orvis, closed the purchase *in reliance on that representation.* He claims that there are interests of Walker which ought to be sold first, and if insufficient, that then the sale of the property of purchasers *subsequent to the purchase by said respondent Orvis* should be ordered.

No such issue as that urged in the argument on this point is made upon the pleadings. If it could have been presented by answer, it has not been done, but its presentation really requires a *cross-bill.*

This is expressly ruled in *Iglehart* v. *Crane*, 42 Ill. 271, because the decree sought is *to the prejudice of a co-defendant.*

Story's Eq. Pleading, § 392.

And there is here no cross-bill.

I therefore submit that this question not having been litigated as between Ricker and Orvis in the Court below, nor any issue presented upon the pleadings upon which it could be, it cannot be litigated here and now.

And further, Mr. Orvis cannot urge the point because he filed no exceptions, and made no objections to the Master's report.

Brockett v. *Brockett*, 3 How. 691.
Harding v. *Handy*, 11 Wheaton. 126.
Pennel v. *Lamar Ins. Co.* 73 Ill. 306.

It may be said, in answer to this last suggestion, that Mr. Orvis was well enough satisfied with the Master's report as reformed and confirmed, because the north 201 feet of block 16 was ordered to be sold (p. Rec. p. 57) *without excepting* the Rogers trust deed, and I admit that I

do not understand how it was possible in accordance with correct practice for the Court, without any exceptions being filed to the Master's report as reformed, and without any suggestion of any kind for a review of that report, to proceed *to change* the order of sale, as already by *its own act* decided upon and entered of record. The insertion of the exception of the estate, interest, etc., of Rogers and Greenebaum & Foreman into the decree thereby ordering the sale in the first instance of the equity *only* of the north 201 feet made a most serious difference to Orvis and to Ricker, and it seems altogether objectionable that this action should have been taken in the face of an unrescinded decretal order upon the Master's report. This furnishes an independent ground for the reversal of the decree, but if it be not deemed sufficient to reverse, then it follows that it was Orvis' duty to except to the report as reformed, and that he cannot be heard because he did not except. His only excuse is that he had a right to rely that the decree would follow the report as amended. If that be true, then the decree ought to be reversed for departing from the report without setting it aside, referring it back or other order. If that be not true, then he cannot urge as against Ricker that to be error which he did not object to in the Court below.

II.

The Court erred in not ordering the south half of block 18 *to be sold first or decreeing specific performance of the Tillinghast agreement.*

This block was conveyed by Samuel J. Walker to Messrs. Coolbaugh & Powers by deed, dated July 1, 1872, and recorded Dec. 7th, 1872. The evidence of S. J.

Walker (p. Rec. p. 65), puts it beyond reasonable question that the purchase by these grantees had fallen through, and they simply held this block in trust for Walker. At all events, in February, 1874, Walker sold the south half of the block to one Tillinghast, for $11.600, and Messrs. Coolbaugh & Powers in their answer (p. Rec. p. 35), say: "That these respondents and each of them is willing that the said contract of said Walker with said Louisa M. Tillinghast be carried out, provided the purchase money aforesaid, to wit: eleven thousand six hundred dollars, with the accrued interest thereon, be applied to the payment in whole or in part of the amount, if any, which shall be found due to the complainant on his said note and mortgage, and the balance, if any, to be paid to these respondents, these respondents hereby offering in such event, to quit-claim to said Louisa M. Tillinghast," etc.

The contract with Mrs. Tillinghast, executed Sept. 3, 1874, by Messrs. Coolbaugh & Powers, and assented to by Walker, is to be found on page 81 of the printed record. The master reported (printed record, p. 57,) that "it would appear, *if the contract had been duly recorded*, that said premises were first liable to be sold for the payment of said mortgage indebtedness."

But what difference could the recording of the contract make, if it be admitted that Coolbaugh & Powers had no interest in block 18, or if they had, nevertheless that they had authorized Walker to sell the same for the payment of the Powell mortgage? Why was not Orvis entitled upon his cross-bill to have Mrs. Tillinghast brought in as a party, and a decree for the conveyance of property upon payment of the notes; or if she failed to do so, then a sale?

But Orvis' cross-bill was dismissed, and while Ricker's was sustained, yet Mrs. Tillinghast was not made a party,

was not bound to pay, and would have got nothing if she had, so that Ricker took nothing by his own success.

Orvis sets up that his contract of purchase was made with the Walkers, Feb. 4, 1874. The contract is dated Feb. 26th, 1874.

The contract with Mrs. Tillinghast (p. Rec. p. 81), is dated Sept. 3d, 1874, and recites a prior agreement of Feb. 9th, with her husband, which was never signed (p. Rec. p. 80), so that she is bound to concede as to her purchase that it was subsequent to that of Orvis. Tillinghast took possession, but it is not shown when, and there is no presumption that it was before the Orvis contract.

III.

The decree should have pursued the Master's report as amended and confirmed (p. Rec. p. 85).

When the case was argued upon the exceptions, that was the *final* hearing. The exceptions were sustained and the report amended, and as amended confirmed (p. Rec. p. 85.

This was final and could not be changed without a rehearing.

Fourniquet v. *Perkins*, 16 How. 82.

If the Circuit Court changed its opinion, the cause should have been set down again or sent back to the Master with directions. Nothing of the sort was done, and it is fairly to be inferred from the record that the decree was entered under some misapprehension.

Much learning is expended by counsel for Greenebaum & Foreman in the effort to show that the decree was correct in excepting the estate, etc. of Rogers, but the answer is that no opportunity was given to test that question.

Ricker acquired title to block 14 by deed recorded April 5th, 1873.

Block 16 had been conveyed by Walker to Coolbaugh & Powers by deed *dated* July 1st, 1872, and was again conveyed by Walker to Kinney *Nov. 25th*, 1872.

Kinney gave a trust deed to Rogers, which was no more in legal effect than a mortgage back to *S. J. Walker*.

This mortgage was not recorded until Oct. 23d, 1873.

The presumption therefore is that that was the date at which Greenebaum & Foreman acquired the security.

The note secured by the Powell mortgage (to be found on page 93) had at that time been *overdue* for three years. It matured in March, 1870, and although interest was paid thereon up to Nov. 1st, 1872, there is no evidence of any extension.

The mortgage was therefore forfeited, and foreclosure could have been had months before any of these transactions.

The transfer to Greenebaum and Foreman was in October, 1873. This was after the panic, and when the cry of those dealing with S. J. Walker was *sauve qui peut*.

Ricker was entitled therefore to insist on subrogation as to this Kinney mortgage.

"Where a mortgagor of two parcels to secure one debt, sold one to A. B. taking back a mortgage to secure the purchase money, and then sold the other parcel to C. D. and became insolvent, and C. D. had to pay the entire debt, it was held that he thereby became entitled to have the mortgage given by A. B. to his grantor, assigned to him, and by means thereof to compel A. B. to contribute towards the redemption of the original mortgage."

Allen v. *Clark*, 17 Pick. 47.

It is settled law in Illinois that any defense can be made against the assignee of a mortgage which could be made if the mortgage were still held by the original mortgagee,

and also that "where a vendor of real estate agrees to remove all existing incumbrances upon the premises, a failure to remove them will constitute a defense in equity against the notes given for the purchase money to the extent of the incumbrance; and such defense will be good, even against the assignee of the notes, *before maturity*, he having notice thereof when he received them."

Tenney v. *Hemenway*, 53 Ill. 97.

Walker's deed to Kinney was a warranty deed. Assuming that it made no difference that the Powell mortgage had long before matured, it is certain that Greenebaum & Foreman took Kinney's notes, secured by the trust deed to Rogers (equivalent to mortgage to Walker), with notice that the encumbrance covenanted against had not been paid. Hence, if the estate, etc., under the Rogers' trust deed were sold to pay the encumbrance, this would furnish a complete defense to the notes. At all events, it seems quite clear that Greenebaum & Foreman could not as against Ricker purchase away his right to have the Kinney notes and mortgage applied upon the Powell mortgage.

The case of *Niles* v. *Harmon*, 80 Ill. 396, is cited, but the facts were apparently entirely different. Frame conveyed to Virden, and took a mortgage back. Virden conveyed in parcels, *first*, to Kussell, who gave notes and mortgage for purchase money; *second*, to Hartshorn; *third*, to Niles. Harmon subsequently acquired Kussell's notes, and upon foreclosure Niles and Hartshorn insisted that Kussell should pay to the extent of these notes on the Frame mortgage; but the Court held *not*, because Kussell was still *bound to pay them* as outstanding in Harmon's hands.

But it did not appear that Virden, the warrantor, was insolvent, nor that Harmon took the notes and trust deed *after* the conveyance to Niles and Hartshorn, nor that Kussell had conveyed back to Virden.

I do not pursue this branch of the discussion inasmuch as Ricker did not appeal, having rested upon the confirmation of the report, which he supposed to be final, and not being informed until the printed record came down that the decree did not correspond with the action then had.

IV.

The rule of the inverse order ought not to have been applied.

Wherever an equity of redemption is sold *as such* in parcels to successive purchasers, all are alike liable to the mortgage debt and not in the inverse order of alienation.

Ordinarily, where the vendor warrants the title as against an outstanding incumbrance, it is assumed that the *full value*, clear of the incumbrance, has been paid; and hence the distinction between that and the case of a purchase *subject* to the incumbrance, in which latter case it is supposed an equivalent reduction in price has been made.

In the case at bar, the Powell mortgage matured in March, 1870.

What is the mortgagor's estate after condition broken?

It is an equitable interest merely, and not a legal estate.

At common law, the mortgagor could have no relief whatever, after condition broken. The title was in the mortgagee *absolutely*, without the right of redemption.

Swett v. *Horn*, 1 N. H. 332.
Darling v. *Chapman*, 14 Mass. 104.
Blanchard v. *Kenton*, 4 Bibb. 451.

Then Courts of Chancery created a remedy, and al-

lowed the mortgagor to redeem. This right of redemption after condition broken, was not a legal estate, and the court of equity created the remedy *because* the legal estate was gone *irrevocably*.

At common law, after condition broken, the mortgagor had neither a legal nor an equitable estate, and the equity courts did not change the common law rule. They merely allowed a remedy to the party to *re-obtain* the legal title. The legal right of redemption exists *before* condition broken. The *equity* of redemption, properly speaking, only afterwards.

An equity of redemption is called a *title in equity*, and cannot be asserted except by subpœna out of chancery.

Viscount, etc. v. *Morris*, 3 Hare, 402.

It is clear that whenever the court of chancery must be called upon to act, before the mortgagor can be reinvested with a legal title, the interest of the mortgagor is equitable merely.

In *Keagon* v. *Schreck*, 52 Ill. 386, the Court says: "It is to be remembered that the right of the mortgagor or his grantee, to redeem *after condition broken, is a purely equitable right*—the creature of the courts of chancery. It is a right which can only be asserted in a court of equity, and when its assertion would be plainly inequitable, the Court will withhold its aid."

In *Carroll* v. *Ballance*, 26 Ills. 16, the Court holds in accordance with the ruling of the English courts, that the mortgagee is the owner of the fee, having the *jus in re* as well as *ad rem*, and the rule is distinctly laid down in the leading case of *Chickering* v. *Failes*, 26 Ill. 519, that certainly after condition broken the legal estate is in the mortgagee.

Nelson v. *Pinegar*, 30 Ill. 473.
Holt v. *Rees*, 44 Ill. 37.
Griffin v. *Marine Co.* 52 Ill. 145.

Since, then, the condition of this Powell mortgage had been broken early in 1870, and all that the Walkers had in the land was the equity of redemption, I submit that the fact that warranty deeds were given to the various purchasers, all of whom took with notice from the record that the Walkers were only conveying the equity of redemption, namely, the right to come into a Court of Chancery and redeem upon paying up, does not justify the presumption that full value had been paid for a clear title, but the contrary.

The case is entirely different when the legal right of redemption is outstanding—that is to say, the right to pay without resorting to a Court of Chancery at all, which only subsists *before condition broken.*

To that state of things the presumption of reliance upon the warranty as securing the exercise of this legal right applies, but this does not follow where the grantor has ceased to have anything but an equitable interest, and has no *estate*, either legal or equitable. The presumption then is that the purchasers bought with their eyes open, and that their equities are equal. The existence of a covenant of warranty in the deed, does not necessarily determine the question in any case. It is only after all, evidence of intent, and in view of the circumstances of this case, it seems to me that the vendor and purchaser stood in each instance upon the same footing, and both intended to contribute in the ratio of their respective interests.

V.

The record in this cause is wretchedly made up, and the pleadings in great confusion. While this is perhaps a reason for reversal, rather than affirmance, it affords fair ground for the expression of the hope that if the decree

be reversed, the cause be so far left open as to permit a rectification of the pleadings, and further evidence in establishment of the actual facts.

Respectfully submitted,

MELVILLE W. FULLER,

Counsel for Sherman A. Ricker.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1878.

EMERSON G. ORVIS,
vs.
NATHAN POWELL.

Appeal from the Circuit Court of the United States, Northern District of Illinois

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Argument on Behalf of Greenebaum & Foreman,

After Rehearing Granted.

JULIUS ROSENTHAL and
A. M. PENCE,
Counsel for Appellee, Greenebaum, et al.

CHICAGO:
PRESS OF BEACH, BARNARD & CO., LEGAL PRINTERS, NO. 104 RANDOLPH STREET.
1879.

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MAY IT PLEASE THE COURT:

Counsel for appellant filed his motion, and obtained a re-hearing in said cause.

We shall confine ourselves to the position taken by counsel in his argument made in connection with his motion for re-hearing.

Among others, we represent Greenebaum & Foreman, who own the promissory note executed by John D. Kinney, and secured by a trust deed executed by him, both note and trust deed bearing date November 25, 1872. The trust deed covers the North 201 feet of Block 16 in Packer's Subdivision, &c.

The only real question raised upon the re-hearing is the question as to the marshaling of the securities.

I.

Did the court err in ordering the premises to be sold in the inverse order of alienation? Such order has become a rule of property in Illinois, according to the decisions of the Supreme Court of that State.

Iglehart v. *Crane*, 42 Ill., 261.
Niles v. *Harmon*, 80 Ill., 396.

II.

Did the Honorable Circuit Court follow, in its decree and order of sale, the rule of the inverse order of alienation?

Blocks 13, 14, 15, 16, 17 and 18 are included within the mortgage. Henry H. Walker originally held the title, but on April 12, 1870, by quit claim deed he conveyed the same to Samuel J. Walker. The notes secured by the Powell mortgage were signed by both Samuel J. and Henry H. Walker. A release was made of part of the premises originally included in the Powell mortgage, prior to the conveyance of any of the above mentioned blocks now in question. The person from whom we are to compute this inverse order is therefore Samuel J. Walker. The indebtedness is his, and the mortgage was assumed by him.

The order of conveyance by S. J. Walker is as follows:

1st. Block 13 to Philpot, by warranty deed, dated September 10, 1870. *Recorded December* 9, 1870.

2d. Block 17 to Ralston, by warranty deed, dated October 2, 1871. *Recorded September* 4, 1872.

3d. Block 15 to Brennock, by warranty deed, dated March 18, 1872. *Recorded October* 10, 1872.

4th. Block 16 to Kinney, by warranty deed, dated November 25, 1872. *Recorded December* 2, 1872.

5th. Block 18 to Coolbaugh & Powers, by warranty deed, dated July 1, 1872. *Recorded December* 7, 1872.

6th. Block 14 to Ricker, by warranty deed, dated February 25, 1873. *Recorded April* 5, 1873.
(See printed Record, pp. 95, 96, 97.)

Of course the rights of parties date from the date of record of these respective deeds.

Now, then, if nothing further had happened, counsel for appellant would be correct. Block 14 should be sold prior to Block 16.

Greenebaum & Foreman claim under a trust deed upon Block 16, and they have no cause of complaint, because the court did order Block 14 to be sold before their interest in Block 16. Walker conveyed Block 16 to Kinney, who executed his note for $12,000 to S. J. Walker, and secured same by trust deed to Rogers. That trust deed was not recorded until October 23, 1873, but at the time it was recorded Kinney still held the title—he not reconveying to H. H. Walker until March 6, 1874.

Of course a mortgagee occupies the position of a purchaser (1 Jones on Mortgages, § 458), and the rights of the holders of the notes rise no higher, nor do they fall any lower than the rights of Kinney. As between Kinney and Ricker, Kinney would have had the right to have Ricker's Block 14 first subjected to the payment of the Powell mortgage, because the deed to him was first in point of time. And if he had that right, so do his privies in estate. Greenebaum & Foreman are his privies in estate, claiming through Rogers, the trustee under Kinney. Some point has been made, but not seriously insisted upon, that the Rogers trust deed, under which Greenebaum &

Foreman claim, had not been delivered to the trustee. The Supreme Court of Illinois holds that a delivery to the *cestui que trust*, the holder of the note, will answer all the requirements of the law.

Crocker v. *Loewenthal*, 83 Ill., 579.

The note in question came into the possession of Greenebaum & Foreman at its date. Such is the presumption of law, there being no proof as to the exact time of indorsement.

Stewart v. *Smith*, 28 Ill., 397.
White v. *Weaver*, 41 Ill., 409.

The note was bought by Greenebaum & Foreman before its maturity, and before the conveyance by Kinney to Walker, or by Walker to Orvis.

This note bore date November 25th, 1872, and fell due three years after date, viz, on November 25th, 1875. The bill was filed in this cause July 23d, 1874, and the final decree entered June 5th, 1875, prior to the maturity of the note so held by Greenebaum & Foreman.

Under the rule of the inverse order of alienation, it may be insisted that the security held by Greenebaum & Foreman represents part of the purchase money, and hence as to the amount of the unpaid purchase money, Block 16 should be subjected to the payment of the Powell mortgage before Block 14.

That exact question was decided in the Supreme Court of Illinois in *Viles* v. *Harmon*, 80 Ill., 396.

In the courts of Illinois it is held that although an assignee of notes secured by a mortgage before maturity thereof, will hold the same freed from all equities of the maker, yet, as the mortgage is not a negotiable instrument, upon foreclosure of the mortgage any defense can be made against the assignee thereof as could be made had the

mortgage still been held by the original mortgagee. Such, however, is not the decision of this court. It is held by this court that the mortgage being the mere incident of the debt, that if there can be no defense interposed as against the note, neither can there be against the mortgage.

Carpenter v. *Longan*, 16 Wall., 271.

Although the opposite doctrine is held by the courts of Illinois, yet in the case of *Niles* v. *Harmon*, the Supreme Court of Illinois said :

"But these notes of Kussell (the mortgagor), have "been transferred by Virden (the mortgagee), to Harmon, "and it is Harmon that creates the obstacle to the adjust- "ment proposed. It is said, however, that under the "decisions of this court, Harmon, the assignee from "Virden of Kussell's mortgage, took the mortgage sub- "ject to all the equities to which it might be liable in the "hands of the mortgagee, Virden, and that Harmon stands "in the same and no better position with respect to the "mortgage than Virden, the mortgagee, himself. Grant "this to the full extent, as regards the mortgage, it would "be otherwise as respects the personal liability of Kussell "upon his notes secured by the mortgage. These notes "were transferred by Virden to Harmon before maturity. "Harmon's title to them and to their full payment is un- "impeachable. Kussell must pay them to Harmon in full. "* * The notes being outstanding in the hands of a "*bona fide* purchaser before maturity, places Kussell in the "same condition as respects this question, as if he had paid "for his land at the time of the purchase, and there exists "the same necessity as there would in the latter case, that "in order to protect him from injury, the lands should be "sold in the inverse order of their alienation. The mode of "adjustment suggested by counsel for plaintiffs in error "would be an entirely correct one, were Kussell's notes "still in the hands of Virden (the mortgagee), untransferred.

"The proposal made and contended for as so equitable, "entirely overlooks the feature of Kussell's personal "liability to Harmon upon his notes. We think the "court below decreed correctly in ordering a sale of the "lands in the inverse order of alienation."

The case above quoted from is precisely the case of Greenebaum & Foreman. Kinney and my clients under him have the right to have Block 14, Ricker's Block, subjected to sale before the sale of their interest in Block 16.

There is really no fight between appellant, Orvis, and Greenebaum & Foreman, for both claim from the same source, viz, Kinney. Orvis claims the South 100 feet and we the North 201 feet of Block 16. Orvis' line of argument is precisely our line, and in pressing for a recognition of his rights to have Block 14 sold prior to Block 16, he simply repeats our argument. We both claim that Block 14 should be sold first. We have shown that we are entitled to have Block 14 first sold. Our interest is protected by the decree, and hence we desire to have the decree affirmed.

It is needless to bring in any of the other Blocks into this dispute, for we have shown that Block 14 is the last block conveyed, unless the South 100 feet of Block 16 conveyed to Orvis should be considered last. As to Block 16, Mr. Orvis, the appellant, Mr. Flannagan, the appellee, and Greenebaum & Foreman are the only persons interested as subsequent purchasers.

Kinney took the title thereto by warranty deed from Samuel J. Walker, dated November 25, 1872, recorded December 2, 1872, which was long prior to the date and record of the deed from S. J. Walker to Ricker of Block 14. As to those interested in Block 16 as subsequent purchasers their rights accrued as follows :

(*a.*) Trust deed from Kinney to Rogers, bearing date

November 25, 1872, recorded October 23, 1873, secures note $12,000 held by Greenebaum & Foreman.

(*b.*) Conveyance by Kinney to H. H. Walker, of Block 16, bearing date March 6, 1874, recorded March 16, 1874. Warranty deed, from H. H. Walker to Orvis, bearing date February 26, 1874. Recorded April 9, 1874. Conveys South 100 feet Block 16.

(*c.*) Warranty deed from H. H. Walker to Flannigan, bearing date February 27, 1874. Filed for record April 15, 1874. Conveys North 201 feet of Block 16.

So this court will see that, as to Block 16, Mr. Orvis, the appellant, has no cause of complaint against Greenebaum & Foreman, for the court orders Flannagan's interest first sold, Orvis' interest second, and after these the court orders the sale of the interest of Greenebaum & Foreman.

The only fight the appellant can have is with Ricker. It is conceded that Ricker's Block 14 is more than abundant to pay off the Powell mortgage; and inasmuch as we take no interest in that fight, we must leave Mr. Fuller, counsel for Mr. Ricker, to take care of the same.

Of course, we have a desire that there should be an end to this litigation, and hence that the decree should be affirmed; and, as suggested in our original brief, it would seem that Mr. Orvis could not now insist, as between him and Ricker, that the decree should be reversed, inasmuch as he filed no objection to the report of the Master, as to the order in which the property should be sold; and it is a universal rule that unless objections be filed to the Master's report, in the Master's office, that no complaint will be heard for the first time in this court.

Harding v. *Handy*, 11 Wheat., 126.
Pennel v. *Lamar Ins. Co.*, 73 Ill., 306.

2d. As to the point made, that Henry H. Walker is to be regarded as a stranger, claiming under Kinney, we must leave the discussion of that to Mr. Fuller.

3d. As to the point, that only an undivided one-fourth interest seems by the record to have passed from Powell into H. H. Walker, and that in consequence the mortgage back from H. H. Walker to Powell only transferred an undivided one-fourth, although it purports to convey the whole, and that a decree of sale should have been made only of one-fourth interest, we have to say:

That it is claimed by counsel that the parties have furnished the evidence of the title to the notes in question, which counsel claim is only an undivided fourth, and that the parties must all be bound by it.

The evidence to which counsel refers we presume is the stipulation (Rec., p. 62), whereby it is agreed, "that the "abstract offered in evidence truly represents the record "of the different instruments thereby shown, and the dates "of filing same."

It was introduced for the purpose of enabling the court to pass upon the question of the prior rights of the various parties the priority of the several deeds of conveyance thereby shown.

It was not intended to show an ejectment title. That is not necessary in foreclosures. It does not purport to show the various deeds of conveyances, vesting the title in H. H. Walker.

It was only designed to show the various deeds subsequent to H. H. Walker, and there was no stipulation that the abstact showed the entire title. It was agreed to be evidence only so far as it purported to show various instruments.

Moreover, there is no pretense in the answers of any of the defendants that the mortgage conveyed only an un-

divided fourth. Besides, this very defendant, Orvis, now setting up this defense, claims under Walker and under this very deed; and the abstract does not show that he ever acquired any other interest except the interest derived under this deed of Powell to H. H. Walker. So that he cannot say the mortgage does not cover his interest. He certainly does not show any other interest, and if any other person is to be injured by this decree, let him complain. Orvis cannot be injured by the sale of an interest which does not belong to him. It is not any error that will reverse. If Orvis be not injured by such a decree, he cannot complain.

Orvis claims under H. H. Walker, and under no other person, according to his admissions in his answer; and if H. H. Walker obtained title from any other source than the deed from Powell, of course the title would have passed into Powell, the mortgagee, by virtue of the covenants of warranty in it; and hence Orvis cannot claim that he has any title which Powell, the mortgagee, does not possess, subject to Orvis' right of redemption.

If Orvis has shown that he possessed a title which did not come from H. H. Walker subsequent to the execution of the mortgage to Powell, then the case would be different, but as it is, he claims the same interest with Powell, and nothing more, be it one-fourth or the whole. He has no cause of complaint on this score.

4th. This contest can only be waged between Block 14 and Block 16, for we have shown heretofore, and as appears from the Record (printed pages 95, 96, 97), that all the other Blocks, viz: 13, 15, 17, 18, were all conveyed prior to the conveyance of Block 14.

It is true that Block 18 was conveyed after Block 16 was conveyed to Kinney; and if Orvis stands in the shoes of Kinney, then he is entitled to have both Blocks 14 and 18 sold before Block 16, but Block 14 should be sold be-

fore Block 18, as the latter was conveyed before 14. If this cause should be reversed for the reason that Orvis occupies the position of Kinney, then the order of sale should be as follows:

1st. Block 14, deed to Ricker, recorded April 5, 1873.

2d. Block 18, deed to Coolbaugh, recorded December 7, 1872.

3d. Block 16, deed to Kinney, recorded December 2, 1872.

4th. Block 15, deed to Brennock, recorded October 10, 1872.

5th. Block 17, deed to Ralston, recorded September 4, 1872.

6th. Block 13, deed to Philpot, recorded December 9, 1870.

If the court should think that Orvis does not occupy the position of Kinney, but that H. H. Walker and S. J. Walker are both bound to protect the titles of all the other parties against the Powell mortgage, then would Block 16, in the hands of H. H. Walker, and consequently in the hands of Orvis and Flannagan, be sold first subject to the trust deed made by Kinney to Rogers. In such case the decree would be right.

We not only represent Greenebaum & Foreman in Block 16, but we also represent the interest of Levi Abt in Block 13, and The International Bank, John Brennock and others in Block 15.

The decree is satisfactory, and we think right, as it now stands, and hence we object to a reversal. For any other points not now discussed, we refer the court to our original brief and argument filed herein.

Respectfully submitted.

JULIUS ROSENTHAL AND
A. M. PENCE,
Counsel for Appellee, Greenebaum, et al.

Stamp - 1

Supreme Court of the United States.

October Term, 1878.

EMERSON G. ORVIS, Appellant,

vs.

NATHAN POWELL, Appellee.

No. 35.

And now comes the appellant, Orvis, here and suggests to the court a diminution of the record in this cause, and alleges that there is wanting in said record the following pieces of evidence and papers which belong to the records of the circuit court of the United States for the northern district of Illinois, from which this case is appealed, which pieces of evidence and papers are in the possession of the clerk of said circuit court.

And said appellant, Orvis, suggests and makes known to this honorable court that he is informed, and verily believes, that there has been an interpolation in the original decree passed in this cause of an order, as part of said decree, deeply affecting the appellant's rights and interests.

And said Orvis further shows to this honorable court that this interpolation was unknown to him until after the argument of said cause in this court, and after the application for a rehearing thereof, and was discovered and made known to him for the first time in the manner following: After said application for a rehearing, one of his counsel

went from Washington in behalf of himself and those interested with him in said cause, to make a full examination of the records to see if the whole record had been sent up. Upon examination of the records and papers in the cause in other matters, he had occasion to look at the original decree, and found that the same was not on file, but had been abstracted therefrom. That the counsel made application to the clerk to know where it was, and was informed that he did not know. This was on Friday, and upon Monday, upon again referring to the papers in the cause, the paper containing the decree was found in the file of papers belonging to the case where it was not on the Friday before; and upon inquiry no one in the clerk's office was able to give any information as to when the paper went away or how it came back. To prevent the further absence or spoliation of the paper, the counsel caused a photo-lithographic copy of the same to be taken, which is herewith produced and made a part of this application, and to which the court is referred, showing the interpolations on the margin of said decree, which appear twice; first, on the margin of page 5 of the decree, and afterwards on page 6, and also corresponding interlineations in the body of said decree to make it conform to said marginal interpolations. All of which interlineations and interpolations are not in the handwriting of the person who prepared the original draft of the decree. That said original draft of the decree was in part prepared in consultation with opposing counsel, and when it left the hands of opposing counsel these interlineations were not there, nor were they ever known to the opposing counsel until —— years afterwards; that the decree was presented to the court with the endorsement on page 9, "The above is satisfactory to me.—A. M. PENCE," without the certificate that it was satisfactory to any other of the counsel in the

case. Mr. Pence being the attorney and counsel of the party in whose favor solely the interlineations were made.

And the appellant further suggests and gives information to the court that in the abstract of title filed in said cause it appears that the deed from H. H. Walker, the mortgagor, to Samuel J. Walker, which was in the form of a quit claim, was for the nominal consideration of one dollar only, which would give notice to all the subsequent purchasers of said mortgaged premises that he had conveyed the same subject to the mortgage, so that they must have bought with record knowledge of that fact.

And the appellant begs leave to annex the affidavit of Joseph E. Smith, Esq., of counsel for Ricker, one of the defendants in said cause, with the exhibits thereto attached, and the affidavit of O. D. Barrett, Esq., as evidence of the facts hereinbefore set forth.

Wherefore the appellant prays the court that a writ of *certiorari* in due form shall be ordered, commanding the judge and clerk of said court to send up the original decree of the court ordered to be entered by the court, in order that the interlineations and interpolations may appear to this court; and also a certified copy of so much of the abstract of the title as relates to the conveyance by Henry H. Walker of the mortgaged premises to Samuel J. Walker by his deed of April 12, and recorded the 19th day of September, 1870.

BENJ. F. BUTLER,
Of Counsel for Appellant.

Affidavit of O. D. Barrett.

O. D. Barrett, of the city of Washington, counsellor-at-law, on oath deposes and says that I am of counsel for the appellant in the above-entitled cause; that I argued the same before this court upon the original hearing in the absence of the senior counsel, Mr. Butler; that after the motion for a rehearing was prepared and filed in the cause in behalf of my clients I went to Chicago to examine the record in said cause in the circuit court of the United States for the northern district of Illinois, among other things to see whether there was any diminution of the record sent up to this court which might affect the points taken as matters of error in the rehearing. Upon an examination of the files of the original papers I found the abstract of title to the mortgaged land in question, which showed two facts which I believe material to be known here in the decision of the cause, and which do not appear in the record:

First. That the whole title to the mortgaged property in question was in H. H. Walker, the mortgagor, at the time of the mortgage to said Powell, while in the record of this court it appears that only a title to one undivided quarter part thereof was in said mortgagor; and upon this want of title the appellant had charged error in the decree of the court below at the original hearing and also in the rehearing asked for. I also found that the record shows that the mortgagor, H. H. Walker, had conveyed, for the nominal consideration of one dollar only, the mortgaged property, subject to the mortgage, by his quit-claim deed of April 12, 1870, recorded September 19th, 1870, to S. J. Walker, so that all the claimants by derivative titles through S. J. Walker had record notice that they purchased title through him subject to the mortgage, which fact does not appear in the record here.

I also had occasion to examine the original decree entered by the order of Mr. Justice Blodgett, of the district court for the northern district of Illinois, holding circuit court in said district when said decree was entered. I was unable to find said original decree among the papers on the files of the court, and could learn nothing of its

whereabouts or existence from the clerk of the circuit court, upon careful inquiry made of him in that behalf.

And I further depose and say that I found the paper containing the original decree missing upon my search on Friday, and I am certain that it was not on the file of the court in the cause, nor could I learn anything of it. On the following Monday, I made a further examination of the papers upon other points, and I found among them the original decree, a photographic copy of which is annexed to the motion for a writ of *certiorari* in this case. I then made inquiry where the paper had been found, and when it had been returned to the files in the clerk's office, but could learn nothing as to when or how it had come again upon the files.

I was assisted in my examination, on both days, by J. Rollin M. Squire, Esq., attorney and counsellor-at-law, of Boston, Massachusetts, who went with me to Chicago to assist in an investigation into the matters concerning this suit in Chicago. Both Mr. Squire and myself were very much surprised to find the paper containing the decree, which we felt sure was not among the papers on Friday. Previous to Monday, however, we had been informed by Hon. M. W. Fuller, of counsel for one of the parties in the case, that he had made very dilligent search for said paper containing the decree long previously, and had been unable to find it. Finding interpolations upon the margin of the paper very important to the interests of my client, and interlineations in the body of the decree, in order to prevent further possible spoliation or interlineation of the paper I asked the clerk of the court to allow me to have a photo-lithographic copy made thereof, by sending the original paper containing the decree, in charge of one of his assistants, to a photographer to have a copy taken, which he consented to do, and the assistant going with me, carried the paper to a photographer, where a copy was made, and the original copy was taken back by the assistant to the clerk's office.

Upon receiving the photographic copy I repaired to the clerk's office, and, with the clerk, I compared diligently and carefully the photographic copy with the original, and found them to conform, and that the one was an exact

copy of the other. In this both the clerk and myself agreed. I then asked the clerk to certify and attest to the truth of this copy in due form, under the seal of the court, that the same might be used in evidence. This he declined to do until after he could get the instruction of the justice of that court; and he afterwards informed me that he had been instructed by the judge not to certify and attest said copy. This copy is annexed to the affidavit of Joseph E. Smith, Esq., of Chicago, which is annexed to and made a part of the petition for *certiorari* filed in this case.

Deeming it important that the court here should see the original paper and judge of the differences of handwriting of the interlineations, as part of the evidence in this hearing, I filed a motion, under the eighth rule of the Supreme Court, that the presiding judge should pass an order directing the clerk to send up the paper to this honorable court. That motion, after notification to the opposing counsel, was duly heard before the court, being argued by myself on the one side, and by Mr. Pence, the counsel for the party in whose interest said interpolations had been made, on the other.

I had informed Mr. Pence and the court that a rehearing had been ordered in this cause by this court, and that parties had been directed to file their briefs on or before the 15th day of April. The presiding judge informed me that he would have a conference either in person or by correspondence with Judge Blodgett, who entered the original decree before he made a decision in the matter. I waited some four days for that decision, when it became necessary that I should return to Washington. The motion was not decided when I left. Some ten days afterwards, and within a week of the date hereof, while in preparation for the hearing on this motion, I telegraphed to the clerk of said circuit court to know if said motion had been decided, and learned by telegraph from him that it had not been.

And I further depose and say that the photographic copy annexed to the motion, and the photo-lithographic copies annexed to the printed copies of this motion, and the affidavits in support thereof, are true and exact copies of the paper containing said original decree, and further deponent saith not.

O. D. BARRETT.

Subscribed and sworn to before me this 14th day of April, 1879.

[SEAL.] JOHN T. C. CLARK, *Notary Public.*

STATE OF ILLINOIS,)
County of Cook,) *ss:*

Joseph E. Smith, of lawful age, on oath says that the paper or document of which the annexed is a photographic copy was prepared by Junius Mulvey, complainant's solicitor and this affiant, in accordance, as he verily believes, with the report of the Master in Chancery, as confirmed by the court. That when so prepared the first and second pages were in the handwriting of said Mulvey; that the third, fourth, fifth, sixth, seventh, and eighth pages were in the handwriting of this affiant, and the ninth page was in print; that when the same was so prepared it was agreed upon by the said Mulvey and this affiant as and for the decree to be entered in the suit, to wit: Nathan Powell, complainant, *versus* Henry H. Walker and others; and this affiant had no knowledge, until recently, that the decree was not entered therein as thus prepared. Affiant says further that he now finds that after said draft was so prepared and agreed upon it has been interlined on the margin of page four, also on the margin of page six; that the words "fourth," "fifth," and "sixth" have been changed, respectively, to "fifth," "sixth," and "seventh;" that on page eight the words "fixed by and in the report of said Master" have been erased, and the words "herein as above provided" inserted in their place; and the word "herein" has been interlined between the word "thereof" and the phrase "first above named."

Affiant says further that he does not know when, where, or under what circumstances said interlineations, erasures, and insertions were made; and that each and every of them were made without notice to him, and without any knowledge, information, or intimation on his part. And further he saith not.

JOSEPH E. SMITH.

Subscribed and sworn to this 22d day of March, 1879, before me,

[L. S.] WILL H. MOORE, *Notary Public.*

For a printed copy of the decree as photo-lithographed, see Record, page 85.